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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 300

THE CRUMMER COMPANY, a corporation and R. E. CRUMMER & COMPANY, a corporation, Petitioners

VERSUS

JESSIE BALL duPONT, EDWARD BALL, FLORIDA NATIONAL BANK OF JACKSONVILLE, and ELBERT DENT, as trustees of the Testament Trust created under and by virtue of the Last Will and Testament and Codicils thereto of ALFRED I. duPONT, deceased, and EDWARD BALL, ROGER L. MAIN, JESSIE BALL duPONT, HOWARD S. WHEELER, PAUL L. PIERCE, LOOMIS C. LEEDY, CLYDE C. PIERCE, EDWARD J. MANSFIELD, WALTER P. FULLER, S. WALLACE SHAFER, ARCHIE CLEMENT, WALTER R. GALL, ST. JOE PAPER COMPANY, a corporation, LEEDY WHEELER & ALLEMAN INCORPORATED, a corporation, CLYDE C. PIERCE CORPORATION, a corporation, and CUMMER SONS CYPRESS COMPANY, a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JESSIE BALL duPONT, EDWARD BALL, FLORIDA NATIONAL BANK OF JACKSONVILLE, and ELBERT DENT, as trustees of the Testament Trust created under and by virtue of the Last Will and Testament and Codicils thereto of ALFRED I. duPONT, deceased, and EDWARD BALL, ROGER L. MAIN, JESSIE BALL duPONT, HOWARD S. WHEELER, PAUL L. PIERCE, LOOMIS C. LEEDY, CLYDE C. PIERCE, EDWARD J. MANSFIELD, WALTER P. FULLER, S. WALLACE SHAFER, ARCHIE CLEMENT, WALTER R. GALL, ST. JOE PAPER COMPANY, a corporation, LEEDY WHEELER & ALLEMAN INCORPORATED, a corporation, CLYDE C. PIERCE CORPORATION, a corporation, and CUMMER SONS CYPRESS COMPANY, a corporation, Respondents

Petition For Writ of Certiorari

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 10, 1955, rehearing denied June 21, 1955.

Citations To Opinions Below

The January 16, 1954 memorandum decision of the trial court is reported at 117 F. Supp. 870 and appears in the

Record at p. 60-72. A second memorandum decision of the trial court dated March 5, 1954 on the sufficiency of the amended complaint is unreported and appears in the Record at pp. 97-100. The opinion of the Court of Appeals is not yet reported and is printed in Appendix B hereto, infra, p. 24.

Jurisdiction

The judgment of the Court of Appeals was entered May 10, 1955 (R. 223). Rehearing was denied on June 21, 1955 (R. 230). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether in selecting the appropriate state statute of limitations to apply to a private civil action under the federal anti-trust laws a federal court may disregard state decisions defining and applying a state statute to the same class of cases in favor of following federal decisions applying the limitation statutes of other states.

2. Whether the statute of limitations may be applied to bar the entire cause of action of a plaintiff who suffers cumulative damages from a continuing predatory attack where the attack was overtly in progress and causing substantial damage to plaintiff, and against which plaintiff was defending, within the limitation period.

Statutes Involved

The statutory provisions involved concern only the first question, and they are the Rules of Decision Act, 28 U.S.C. Section 1652, c. 646, 62 Stat. 944 and Section 95.11 of the Florida statutes setting out the state limitation statute. They are printed in Appendix A, infra, p. 21.

Statement

This action was filed under the federal antitrust laws on December 19, 1949 (R. 1). The jurisdiction of the District Court was invoked under Section 4 of the Clayton Act, 15 U.S.C.A. Section 15, alleging violations of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C., Sections 1 and 2. The complaint alleges a direct predatory attack upon the petitioners who were once leaders in municipal finance in America as municipal bond dealers in Florida and many other states. In brief, the complaint alleged that the duPont defendants and certain of their business associates and allies entered upon a deliberate program to suppress and eliminate the plaintiffs from the municipal bond business in order to restrain trade and monopolize the municipal bond field in Florida for themselves.[1] This attack which caused damages to plain-

[1] Respondents, defendants below, have been grouped for convenience in the pleadings below (R. 4), and here, as follows:

(1) Jesse Ball duPont, Edward Ball, Florida National Bank of Jacksonville, and Elbert Dent, as Trustees of the Testamentary Trust of Alfred I. duPont, deceased, Edward Ball, Roger L. Main, and Jesse Ball duPont, individually, these being executives of the duPont interests and St. Joe Paper Company, a corporation. These have been grouped together and denominated in the pleadings as the 'Ball-duPont" defendants;

(2) Howard S. Wheeler, Paul L. Pierce, Loomis C. Leedy (now deceased), Clyde C. Pierce, Leedy, Wheeler & Alleman, Inc., a corporation, and Clyde C. Pierce Corporation, all municipal bond dealers competitive to Plaintiffs. These have been grouped together and denominated in the pleadings as the "Leedy-Pierce" defendants;

(3) E. J. Mansfield, a postal inspector, Walter P. Fuller, part of the time an employee of the State of Florida, and Archie Clement (now deceased) and S. Wallace Shafer, members of the Florida legislature. These have been grouped together and denominated in the pleadings as the "Mansfield-Fuller" defendants; (It should be noted that no error has been specified as to the dismissal of E. J. Mansfield as a defendant).

(4) Walter Gall and Cummer Sons Cypress Company, a Florida corporation, denominated in the pleadings as the "Gall-Cummer" defendants.

tiffs' business in the sum of thirty million dollars, was overtly in progress against plaintiffs until July, 1948 when plaintiffs successfully defended themselves against the last of a series of attacks in the courts and elsewhere. This antitrust suit was filed within eighteen months thereafter.

The conspiracy is described in the Record at pages 24 to 48. In general terms, and indeed in keeping with the general pattern in these cases, the complaint describes an integrated series of events to eliminate petitioners from the municipal bond field by means of malicious interference with established trade relations, ulterior actions under color of government authority, slander of business reputation, fomenting civil litigation and criminal prosecution, interference with permits to engage in securities business, etc. (R. 25). Most of the overt acts involve the wrongful and ulterior inducement of state or federal authorities to take action against petitioners.

The trial court dismissed the complaint and the amended complaint on the ground that the Florida three-year statute of limitations barred the entire case. He rejected petitioners' claim that the four-year statute was appropriate under Florida law.[2]

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[2] Florida statutes, infra, p. 21, provide a three-year limitation for "liability created by statute" and a four-year period for actions "not specifically provided for". In Florida, an action for "conspiracy" is an independent action governed by the four-year statute, even though its component torts may be "specifically provided for" elsewhere in the limitation statute. **Faulk v. Allen,** 152 Fla. 413, 12 So. 2d 109 (1943). This conspiracy action includes particularly conspiracy to damage the business, credit and reputation of another. Florida has consciously disregarded the law of other jurisdictions which do not recognize the conspiracy action as independent of its constituent torts. **Garsed v. Sugarman,** 99 Fla. 327, 126 So. 157 (1930); **Harford v. Graves,** 102 Fla. 835, 136 So. 620 (1931); **Dr. P. Phillips & Sons v. Kilgore,** 152 Fla. 578, 12 So. 2d 465 (1943); **Faulk v. Allen,** 152 Fla. 413, 12 So. 2d 109 (1943); **Hun-**

The Court of Appeals affirmed the selection of the Florida three-year statute and likewise held the entire action to be barred except, however, it remanded the case for a trial of the issue of fraudulent concealment as an avoidance of the declared limitation bar, holding: "* * * we think it quite clear that plaintiffs' amended complaint does well state their claim, that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it * * *" (R. 221).

In a section of its opinion entitled, "The Accrual of the Cause of Action" (infra p. 41-44, R. 218-222) the Court of Appeals rejected the contention of petitioners that limitation does not bar the case because the pleadings disclose that the attack upon plaintiffs in this case consisted of a single coordinated attack composed of a single series of contemplated acts to arrest and keep arrested plaintiffs business, the damage resulting from the cumulative effect of these attacks as respondents planned it and executed it. The allegation was that the defendants intended to design, deliver, and sustain a single series of well-timed, mutually complementary attacks upon plaintiffs' business, the defendants secretly aiding and abetting each other and secretly utilizing their various facilities and materials, thus making it appear that plaintiffs were being lawfully prosecuted by various government agencies and in various courts, when in truth and in fact all attacks were stemming from a private but concealed source. (R. 78). In this regard defendants were still attacking and causing damage while plaintiffs were still defending against the attack until July,

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ter Lyon, Inc. v. W. H. Walker, 152 Fla. 61, 11 So. 2d 176 (1942); Duval Laundry Co. v. Reif, 130 Fla. 276, 177 So. 726 (1937).

1948, at which time the so-called Pasco suit was terminated in plaintiffs' favor by findings which not only exonerated plaintiffs from gross charges of fraud and overreaching of the taxing units of Florida, but also adjudicated that this Pasco litigation, filed in 1944 and maintained in the courts for 4 years, appeared to be a means of maliciously damaging the reputation and business integrity of petitioners, because plaintiffs in that case knew or should have known that the charges of fraud, misrepresentation, and overreaching could not be sustained (R. 42).

Even though petitioners filed their antitrust action within eighteen months of this date, the Court of Appeals held that limitation ran from each overt act causing damage as it occurred. The Court held that "a cause of action accrues upon, and limitation commences to run from, the doing of the first wrongful act" which causes damage and thereafter "successive claims would arise out of successive unlawful acts" causing damage, but such later damages "would be concerned only with the successive occurrences" and would not extend the period of limitation as to earlier acts done or injuries caused. In dealing with the fact that the Pasco suit continued as a damaging overt attack until July, 1948, the Court said that petitioners "might have asserted successive causes of action" but they did not do so. To the contrary, the Court held, petitioners elected to and have alleged but a single cause of action, and thus the damage from the Pasco case becomes immersed in the damages of the whole conspiracy covering several years. The court emphasized several times that under its interpretation of the pleadings that by 1944 "the damage had substantially all been done," an interpretation to which the court adhered even in the face of petitioners' prayer for injunction against these violations so they could continue their business and their further allegations that the

Pasco suit was coordinated with the balance of the attack, and that petitioners could hardly do business with the taxing units of Florida while still defending against spurious charges of fraud and overreaching brought in the name of Florida's supervisor of public finance, the State Board of Administration. (R. 78) But the court below held as a matter of law that limitation was running while petitioners were still defending against the overt attacks of this conspiracy.[8]

REASONS FOR GRANTING THE WRIT

I—The question of the multiple cause of action theory as applied to limitation for anti-trust cases

Introduction

A brief word is necessary concerning the history of this multiple cause of action theory as to limitation in Anti-trust cases. The issue has been developing in the lower courts for more than twenty years without Supreme Court intervention at any point. In 1934 the Sixth Circuit said that limitation runs from "an overt act, or from the last of a contemplated series of overt acts". *Northern Kentucky Telephone Co. v. Southern Bell Telephone and Telegraph Co.*, 73 F. 2d 333, cert. den., 294 U.S. 719 (1935). Recovery was denied because no overt act occurred within the limitation period. The Court reasoned that this rule was a "necessary corollary" to the rule of *Nalle v. Oyster*, 230 U.S. 165 (1913), which held that no civil action will

[8] To portray as briefly as possible the timetable of events to which limitation has been applied, we have summarized some of the highlight allegations of this case in Appendix C, p. 47, infra.

lie for conspiracy alone unless there is also an overt act which causes damage to the plaintiff.

Two years later the Ninth Circuit in *Foster and Kleiser v. Special Site Sign Co.*, 85 F. 2d 742 (1936), cert. den. 299 U.S. 613 (1937) said (in dictum) that it was error for the trial court to authorize the jury to fix damages for the entire conspiracy if the jury found that the overt acts extended into the limitation period. The Court implied that the period of recoverable damages would be three years before the filing of suit. However, the point was lost in questions of interstate commerce.

In 1948 and 1950, the *Borax* cases from California pronounced the rule rigidly that limitation runs from each overt act, i.e., "each time the plaintiff's interest is invaded to his damage". *Burnham Chemical Co. v. Borax Consolidated Ltd.*, 175 F. 2d 569 (C.A. 9, 1948), cert. den. 337 U.S. 961 (1949); *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.*, 185 F. 2d 196 (C.A. 9, 1950), cert. den. 340 U.S. 943 (1951) affirming 81 F. Supp. 301. In both cases certiorari was sought, but in both cases the defendants were able to show that the judgment below was supportable upon other grounds, namely: that these conspiracies and all their overt acts occurred (and did their total damage) well outside the limitation period. Therefore, it was theoretical to discuss the multiple cause of action theory.

Since these cases, many decisions have argued the multiple cause of action theory.[4]

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[4] **Momand v. Universal Film Exchange, Inc.**, 43 F. Supp. 996 (D.C. Mass. 1942);
Momand v. Universal Film Exchange, Inc., 172 F. 2d 37 (C.A. 1, 1948), affirming 6 F.R.D. (D.C. Mass. 1947);
Foster and Kleiser v. Special Site Sign Co., 85 F. 2d 742, cert.

Apart from the "necessary corollary" deduction made in the *Northern Kentucky* case, supra, so far as we can determine, the lower courts have delved no deeper than to distinguish the criminal cases such as *United States v. Kissel*, 218 U.S. 601 (1910) in which it has been held that limitation does not begin to run until the last overt act is done pursuant to the conspiracy. Beyond this there has been little more than mechanical repetition that limitation runs from each overt act. There has been only one dissenting, or perhaps distinguishing, voice. In *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 100 F. Supp. 15 (D.C. N.Y., 1951) the Court refused to apply the multiple cause of action theory to a case very much like the present, holding that the multiple cause of action theory will not be applied to a single continuous wrong caused by the cumulative effect of a contemplated series of acts.[5] The Court emphasized that many of the acts in the case were innocent and lawful in themselves but were inter-related and integrated with other conduct in order to bring about the pur-

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den. 299 U.S. 613 (1937);
Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F. Supp. 15 (D.C. N.Y. 1951);
Burnham Chemical Co. v. Borax Consolidated Ltd., 175 F. 2d 569 (C.A. 9, 1948), cert. den. 337 U.S. 961 (1949);
Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd., 185 F. 2d 196 (C.A. 9, 1950), cert. den. 340 U.S. 943 (1951) affirming 81 F. Supp. 301;
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McClellan v. Montana-Dakota Utilities Co., 95 F. Supp. 977, 104 F. Supp. 46 (D.C. Minn. 1952), affirmed 204 F. 2d 166 (C.A. 8, 1953), cert. den. 346 U.S. 825 (1953);
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Emich Motors Corp. v. General Motors Corp., CCH Trade Cases, Par. 67960 (D.C. Ill. 1955).

[5] **Winkler-Koch** involved a series of 40 suits for patent infringement, amid many acts of slander, coercion and fraud directed to

pose of the conspiracy, 100 F. Supp. at p. 29. It is easy to recognize that the Court was borrowing from the language of *Northern Kentucky* and avoiding the absurdity of 40 and more limitations on the same case.

All the other plaintiffs in Footnote 4 failed. However, upon very close scrutiny of the facts, it appears that this is the first actual holding which completely bars a plaintiff in the face of attack, defense and damage all concurring within the limitation period.

At this point in the development of the law and on this record, we suggest that this is an entirely proper case for the grant of certiorari on the multiple cause of action theory for these reasons:

A. The Issue is of Importance to the Enforcement of the Anti-trust Laws by Private Suit

The cases above cited demonstrate the prominence of the question and its potential presence in almost every anti-trust case. These cases further demonstrate another fact of common knowledge, namely: that the applicable limitation periods now range as low as two or three years, and even after January, 1956, the period will be only four years in anti-trust cases.[6] Major restraints of trade and monopolies are not too often accomplished within such a short period. To the contrary, the elimination of a competitor or the accomplishment of a monopoly is traditionally the

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plaintiff and its customers. The Court held that the multiple cause of action theory did not apply to such case, but only where the conspiratorial acts were individualized overt acts which were *per se* violations of the anti-trust laws or where acts on single days constituted completed torts, to each of which a definite injury and consequent damage may be attributed. In **Winkler-Koch** the illegality of the plan made unlawful its otherwise lawful parts.

[6] See Footnote 7, p. 19.

product of a systematic program of innocent and subtle acts interspersed over a period of years.

Furthermore, the decision below immerses the latter day overt acts and damages into the violations of the past, and in a very real and practical way creates an immunity arising out of statute-barred conduct in the past. It is thus akin to *Lawler v. National Screen Service Corp., et al.*, —U.S.—, —S. Ct.—, 99 L. Ed. (Adv. p. 671), decided at the last term of this Court. There it was held that immunity for latter day conduct cannot be found in principles of *res judicata*.

One can imagine the plight of the Anti-trust laws if their vitality depends upon a plaintiff who must elect to sue upon less than the whole conspiracy and prove his damage from the unbarred violations only, dissecting and removing the cumulative effect of earlier violations. Yet this is what was meant if we read correctly, page 43, infra:

> "While appellants might have asserted successive causes of action with limitations beginning to run from each act in violation of the anti-trust laws for the damages flowing therefrom, plaintiffs' case is not so alleged. * * * "
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> * * *
>
> "If plaintiffs had desired to allege their case differently, they might have well claimed that limitation commenced to run as to each alleged claim of wrong doing and the damages caused thereby. Thus, if plaintiffs had been able to allege a new and additional cause of action and new damages growing out of the filing and maintenance of the Pasco suit, and that these acts and these damages had occurred within the limitation period after 1946, they would, as to such damage stand quite differently."

B. There is Confusion in the Courts Below

As we have reviewed briefly, the Courts below have ended up with variable results. The *Northern Kentucky* case would start limitation from each overt act "or the last of a series of contemplated acts". Its offshoot, the *Winkler Koch* case, is clear that no part of the damages are barred where the overt acts of an integrated plan continue into the limitation period. The *Burnham* case at least implies that the recoverable damages may include the limitation period but may not go back of this period. The case at bar holds that the latter overt acts do not affect limitation as to the entire conspiracy and furthermore that plaintiff must elect to stand upon the latter acts alone and must separate these damages from those of the main conspiracy. This is as close to conflict of decision between the circuits as can be expected in this field if due regard is given to the fact that the various cases arise from an infinite variety of facts. Notwithstanding this variety in facts, the basic pattern in these cases is much the same.

C. The Decision Below Does Not Comport With the Basic Concepts of Anti-trust Law

It goes too far to say that in every case limitation runs from each overt act which causes damage. This is inconsistent with modern concepts of anti-trust law.

Perfectly lawful acts and conduct become actionable under the anti-trust laws only because they are joined with other acts in a conspiratorial purpose. *Bedford Cut Stone Co. v. Journeymen Stonecutters Assoc. of America*, 47 S. Ct. 522, 274 U.S. 37, 71 L. Ed. 916.

The existence of a violation is determined from the totality of conduct not by dismembering and viewing the in-

dividual parts of a conspiracy. *U. S. v. Patten,* 226 U.S. 525, 33 S. Ct. 141, 55 L. Ed. 333 (1913).

Harmless conduct by one person may become actionable because there is concert with many. *Grenada Lumber Co. v. Mississippi,* 217 U.S. 433, 30 S. Ct. 535, 54 L. Ed. 826.

Even the exercise of the highest statutory rights and privileges, such as the bringing of a suit which is believed to be sound, may become actionable as a part of a conspiracy. *Kobe, Inc. v. Dempsey Pump Co.,* 198 F. 2d 416 (C.A. 10, 1952), cert. den. 344 U.S. 837.

The rule of multiple cause of action does not always fit with these hornbook principles. The law is here pronounced that limitation runs from each overt act, but each overt act in this case, standing alone, may be innocent and lawful. Indeed, as to such matters as the lodging of complaints to governmental authorities and the filing and prosecution of litigation, they are not merely lawful but are normally surrounded by privilege and immunity pursuant to the highest considerations of public policy. Limitation cannot properly be started from every such act without regard to the entire course of conduct.

D. Principles of Established Credibility in the Field of Limitation Law Ought to be Considered by the Supreme Court

It is not absolutely necessary, as the Court below implies, to surrender the enforcement of the anti-trust laws to the multiple cause of action theory for every case. In addition to the *Northern Kentucky* and *Winkler-Koch* cases, supra, which have recognized the distinction appropriate to an integrated course of conduct, the Supreme Courts of the three states have applied the single cause of action rule to in-

tentional, repeated tort. *Montgomery v. Crum* (1928), 199 Ind. 660, 161 N.E. 251; *Clark v. Machette* (1933), 92 Colo. 365, 21 P. 2d 182; *Kansas City v. Rathford* (1945), 353 Mo. 1130, 186 S.W. 2d 570.

It has been held that a series of wrongful acts all aimed at a single result and contributing to the injury complained of, to-wit: the destruction of one's business, credit, and reputation, may be declared upon as a single claim and may not be dismembered on defendants' motion in order to apply variable statutes of limitation. *Original Ballet Russe v. Ballet Theatre,* 133 F. 2d 187 (C.A. 2, 1943):

In *Urie v. Thompson,* 337 U.S. 163 (1949), this Court recently rejected the multiple cause of action theory in a federal personal injury case, at the same time adopting a well designed state rule that in silicosis cases, limitation does not run from day to day, but only when the accumulated effects manifest themselves by way of an active disease.

E. The Judgment is Final as Regards This Multiple Cause of Action Theory and the Case is Fully Mature on This Issue.

If the Supreme Court agrees with petitioners that the question here involved is sufficiently important and mature to merit certiorari from the standpoint of a proper administration of justice, we respectfully submit that the Court of Appeals' remand on other issues should not prevent the grant of the writ.

Of course, the matter is not jurisdictional as in cases from state courts.

At this point in the case the question of the limitation bar is finally settled and the law of the case is made. No

issue of fact can be tried by which petitioners can prove the integrated plan and purpose of the conspiracy. Any further proceedings below must be on subjects other than the multiple bar of limitations with which petitioners are now confronted. If we return for certiorari later, armed with a final judgment, our record on this issue must be the same as it is now—namely a ruling on the pleadings.

As litigants, petitioners are entitled to call the Court's attention to the awful prospect of the expensive litigation which lies before us in this mammoth case before we reach the right to petition this court if the remand below is held decisive of itself. Many plaintiffs have fallen in anti-trust from the excessive cost of justice.

From the Supreme Court's standpoint, we submit on the other hand, that this issue has been fully litigated below and the record is entirely adequate to bring under fruitful examination these basic issues concerning the proper limitation rules for these anti-trust cases. We also have the meaningful experience over 20 years that the cases by and large have turned on the pleadings. It is hardly likely that any case can reach this court short of many years except on the pleadings, especially if the opinion below is left to make its mark upon the law.

II—The Question of Selection of the Proper State Statute

A. *The Decision Below Is Probably Erroneous*

The court below erred in the selection of the three-year statute and in the rejection of the four-year statute, because it referred to federal decisional law pertaining to the statutes of other states and failed to read with meticulous care the special pronouncements of Florida law.

In Florida a coherent and substantial body of law pronounces the rule that Florida, unlike other jurisdictions, recognizes conspiracy as an independent civil action. For this reason the four-year statute applies. *Faulk v. Allen*, 152 Fla. 413, 12 So. 2d 109 (1943). The Florida cases include particularly the type of predatory attack aimed at one's business, as is involved in this case. See cases cited in footnote 2, supra.

We pressed upon the court below, and urge here, that since 1895, *Campbell v. City of Haverhill*, 155 U.S. 610, has been clear law that the purpose behind the Rules of Decision Act and the decision in that case was to place plaintiffs in federal actions in the exact position limitation-wise as plaintiffs in the same class of cases arising under state law. The task of selection has required a meticulous reading of the state decisions on limitation. *Cope v. Anderson*, 331 U.S. 461 (1947). The Florida decisions ought to be read as if they were a part of the text of the statute. *Sun Theater Corp. v. RKO Radio Pictures*, 213 F. 2d 284 (C.A. 7, 1954); *Northern Kentucky Telephone Company v. Southern Bell Telephone and Telegraph Co.*, 73 F. 2d 333 at p. 335.

The Seventh Circuit in the *Sun Theater Corp.* case has recently criticized several recent district decisions for straying from the obligation to adhere to the state statute as construed by the state supreme court in favor of a "federal" approach. The *Northern Kentucky* case selected the "conspiracy" section of the Kentucky statute for antitrust cases in preference to "liability created by statute" by careful comparison with the same class of cases under Kentucky law.

In the instant case the Court of Appeals distinguished the *Northern Kentucky* case on irrelevant grounds and

failed to accept the limitation decisions of the Florida Supreme Court for the same class of cases.

B. *The Decision Below Is In Conflict With Other Circuits*

The decision of the Fifth Circuit relying solely upon federal decisions, rather than upon Florida decisions, is in direct conflict with the decisions of three other circuits, all of which felt themselves bound by the decisions of the respective state courts in similar federal anti-trust cases: *Williamson v. Columbia Gas & Electric Co.*, 3 Cir., 110 F. 2d 15 (1939); *Northern Kentucky Tel. & Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 6 Cir., 73 F. 2d 333 (1934); *Sun Theatre Corp. v. R.K.O. Radio Pictures*, 7 Cir., 213 F. 2d 284 (1954); *Schiffman Bros. v. Texas Co.*, 7 Cir., 196 F. 2d 695 (1952); *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*, 7 Cir., 191 F. 2d 912 (1951).

Four United States District Courts have made substantial contributions to the confusion and conflict by expressly rejecting the Rules of Decision Act in similar anti-trust cases and, instead, following a "federal" approach without reference to state decisions. These cases have been analyzed and criticized by the Seventh Circuit in the *Sun Theatre Corp.* case, supra. The four District Court decisions are: *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, D.C. Colo., 105 F. Supp. 506 (1952); *Electric Theatre Co. v. Twentieth Century Fox Film Corp.*, D.C. Mo., 113 F. Supp. 937 (1953); *Fulton v. Loew's*, D.C. Kan., 114 F. Supp. 676 (1953); and *Leonia Amusement Corp. v. Loew's*, D.C. N.Y., 117 F. Supp. 737 (1953).

In the *Northern Kentucky Telephone* case, supra, the Court had to apply the Kentucky statute of limitations.

The Court selected, on the basis of *Kentucky decisions*, the limitation for an action for *conspiracy*, as opposed to a limitation for "an action upon a liability created by statute, when no other time is fixed by the statute creating the liability." Inasmuch as the Florida Supreme Court has specifically held that Florida's four-year limitation governs an action for *conspiracy*, the federal court was bound by the Rules of Decision Act to treat that decision as a specific statute of limitations for an action for *conspiracy*. But the Fifth Circuit evidently did not consider itself bound by Florida decisions, thus reaching exactly the opposite result of that reached by the Sixth Circuit.

C. *Other Considerations*

In the present case, the Court is called upon to clearly define the effect of the Rules of Decision Act in purely federal cases in which an absence of federal law makes it necessary for the court to resort to a state statute. The early cases (*McCluny v. Silliman*, 3 Pet. 270, 7 L. Ed. 676 (1830); *Campbell v. Haverhill*, 155 U.S. 610, 15 S. Ct. 217, 39 L. Ed. 280 (1895); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906) were unambiguous enunciations of this principle. However, the disregard of this important federal statute in the instant case, and in others cited herein, demonstrates the current need for a strong re-statement by this Court that: *In any case wherein a federal court must resort to a statute of a particular state in order to select a limitation statute for a federal cause of action, the federal court is bound to treat the decisions of the highest court of the state, interpreting and applying the state statute, as if such decisions were expressly set forth in the text of the state statute, in*

order to find and apply the limitation period for the same class of cases under state law.

The fact that, subsequent to the decisions complained of, the Congress has enacted a four-year statute of limitations for private anti-trust actions (Public Law 137, 84th Cong., Ch. 283, H.R. 4954) does not destroy the importance of the question here presented. The new limitation does not become effective until six months after July 7, 1955, and does not affect cases previously barred.[7] This statute does not touch any anti-trust violation occurring and barred by some state statute before January, 1956.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 7, 1955

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[7] Sec. 4-B. "Any action to enforce any cause of action under Sections 4 or 4-A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." (Enacted July 7, 1955; effective January 7, 1956).

Certificate of Service

I certify that on this 7th day of August, 1955, all adverse counsel representing all respondents have been served under Rule 33, paragraph 1, by depositing a copy of this petition in a United States post office, properly addressed to each of them, with postage affixed for airmail delivery.

_____

Attorney for Petitioners

APPENDIX A

RULES OF DECISION ACT: (§ 34, Federal Judiciary Act of Sept. 24, 1789, Chap. 20, 28 U.S.C. § 725, Revised Stat. § 721, as amended June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. § 1652), which provides:

> "The laws of the several states, except where the Constitution or treaties of the Unitd States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

FLORIDA STATUTE OF LIMITATIONS:

> "Fla. Stat. 95.11.—Limitations upon actions other than real actions.—Actions other than those for the recovery of real property can only be commenced as follows:
>
> (1) WITHIN TWENTY YEARS.—An action upon a judgment or decree of a court of record in the state of Florida, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.
>
> (2) WITHIN SEVEN YEARS.—An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any foreign country.
>
> (3) WITHIN FIVE YEARS.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal.
>
> (4) *WITHIN FOUR YEARS.—Any action for relief not specifically provided for in this chapter.*
>
> (5) *WITHIN THREE YEARS.—*

(a) *An action upon a liability created by statute, other than a penalty of forfeiture;*

(b) An action for trespass upon real property;

(c) An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property;

(d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(e) And an action upon a contract, obligation or liability not founded upon an instrument of writing, including an action for goods, wares and merchandise sold and delivered, and on store accounts.

(6) WITHIN TWO YEARS.—An action by another than the state upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon account of an act causing a wrongful death.

(7) WITHIN ONE YEAR.—

(a) An action by the state for a penalty or forfeiture under a penal act of the legislature;

(b) Suits for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime.

(8) IN CASE OF MUTUAL ACCOUNT.—In an action brought to recover a balance due upon a mutual, open and current account where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side."

History.—§ 10, ch. 1869, (1872); § 1, ch. 3900, Laws of 1889; Revised Statutes 1294; General Statutes 1725; § 10, ch. 7838 (1919); Revised General Statutes 2939; Compiled General Laws 4663; am. § 1, ch. 21892, (1943); am § 7, ch. 24337, (1947).

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15067

THE CRUMMER COMPANY and R. E. CRUMMER & COMPANY,

Appellants,

versus

JESSIE BALL duPONT, ET AL., AS TRUSTEES, ETC., OF THE LAST WILL AND TESTAMENT OF ALFRED I. duPONT, DECEASED, ET AL.,

Appellees.

CLYDE C. PIERCE and CLYDE C. PIERCE CORPORATION,

Appellants and Cross-Appellants,

VERSUS

R. E. CRUMMER & COMPANY, ET AL.,

Cross-Appellees.

Appeal and Cross-Appeal from the United States District Court for the Northern District of Florida

---

(May 10, 1955)

Before HUTCHESON, Chief Judge, and Rives and TUTTLE, Circuit Judges

HUTCHESON, Chief Judge: Filed December 19, 1941, under the anti-trust laws of the United States,[1] by the two Crummer companies, dealers in Municipal bond issues, as plaintiffs, against the Ball duPont group, Jessie Ball duPont, her husband, Edward Ball, and the other defendants named therein, and three other groups known and referred to respectively as Leedy-Pierce, Mansfield-Fuller, and Gall-Cummer, the complaint alleged damages to the Crummer Company and R. E. Crummer Company, respectively, in the amounts of $7,500,000 and $2,500,000, trebled in each case as required by statute, to make $30,-000,000 in all, together with an injunction against further violations of the anti-trust laws.

Because its substance is set out and the complaint is analyzed in the opinion [2] of the trial court, we shall here attempt no more than a brief summary of its contents. Alleging: that between the years 1922 and 1928, a municipal investment dealer known as Brown-Crummer Investment Company, purchased a large number of the initial securities of various Florida taxing units and sold them to investor customers; that in 1934 R. E. Crummer & Company was organized and became successor to the business of the Brown-Crummer Investment Company; and that in 1942 the Crummer Company was organized to become successor to and take over the business of R.

[1] Paragraph one of the complaint "Jurisdiction", reads as follows: "1. This action arises under the Anti-trust Laws of the United States, more particularly under Sections 1, 2, and 7 of the Act of July 2, 1890, generally known as the Sherman Act (26 Stat. 209 as amended by 50 Stat. 693), and Sections 4, 12, and 14 of the Act of October 15, 1914, generally known as the Clayton Act (38 Stat. 730), both Acts being set forth in Title 15 of the United States Code, and other relevant sections of the Anti-trust laws of the United States, as hereinafter more fully appears."

[2] Crummer, et al. v. duPont, et al., 117 Fed. Supp. 870.

E. Crummer & Company, effective January 1, 1943; the complaint further alleges the unprecedented economic and financial debacle in Florida, involving its various taxing units, beginning in 1929, and the activity of the Brown-Crummer Investment Company, and its successor, in working out refunding plans, with the result that R. E. Crummer and Company obtained a pre-eminent position in the municipal bond field in Florida and from the year 1934 through 1942 made a large net profit on its operations.

Recurring then to the formation of the Ball duPont plan to capture and "virtually control the State of Florida by a general infiltration area-wise of the control of the financial, commercial, transportation and manufacturing institutions and resources of Florida", the complaint alleges: that the initial cleavage between R. E. Crummer and Edward Ball occurred in the year 1929; that from this point forward up to and including the time of the filing of the complaint, the defendant Edward Ball has continuously criticized the undertakings in Florida and all companies bearing the Crummer name; that from 1933 and continuing without any serious consequences until 1941, the Ball duPont defendants and the Leedy-Pierce defendants became active participants in the bond market and competitors of plaintiffs; and that sometime in 1941, at least before May, 1941, the exact date not being given because of the secrecy and concealment attending its formation and execution, the illegal combination, conspiracy, etc. complained of herein began. As detailed, these activities consisted of: acts of the Legislature of Florida calling for an investigation of the activities of all bonding companies in Florida; the issuance of executive orders and the appointment of committees by the Gov-

ernor of Florida; investigations by the Post Office Department and the Securities and Exchange Commission; and the returning of two indictments against R. E. Crummer & Company and others, on August 3, 1944, in the United States District Court for the District of Kansas.

Alleging in effect that the bringing of these indictments and the unfavorable publicity attending their pendency until they were dismissed on June 10, 1946, "brought about the destruction of the plaintiffs' business and property, as was intended by defendants", the complaint went on, in paragraph 38 (t) to say:

> "The said criminal indictments remained upon the docket of the United States District Court until June 10, 1946. During the pendency thereof, plaintiffs' business was paralyzed and eventually destroyed and plaintiffs were thereby effectively eliminated and suppressed as competitors in the municipal investment field in the United States. Enormous expenses for the preparation of the defense to the said criminal indictments were incurred. Plaintiffs and their officers and employees were substantially driven from the municipal investment field of the United States."

Alleging many overt acts, including the criminal indictments in Kansas, the two civil suits in Florida, the Lathrop suit in the Federal Court, and the Pasco suit in the State Court, ostensibly instigated and carried on by public authorities but, as complainants alleged, in fact instigated by, and carried on as a result of the conspiracy of, the defendants in violation of the anti-trust laws, to recover for which this suit is brought, the complaint further alleged that, though the confederation, combination

and conspiracy, and the unlawful acts and things occasioned and done by defendants in furtherance of their predetermined purposes and objectives, began early in the year 1941, the existence of said illegal conspiracy, the name and identities of the persons participating in it, the purpose and objectives to be accomplished thereby, and the scheme by and through which it would be achieved, were not discovered by the plaintiffs until January, 1947.

While, as might be expected, with so much allegedly at stake and such a long period of time covered by it, the complaint, consisting of 53 printed pages, with 44 numbered paragraphs, was lengthy, argumentative, and replete with mere conclusions, the district judge thought it did contain factual allegations sufficiently charging the Ball duPont defendants and some of the other defendants with a scheme or plan to capture the bond business in Florida, and with a conspiracy, in violation of the Federal anti-trust laws, to destroy plaintiffs and their business.

He was of the further opinion, however, that, as to the claims made against the defendant, Edward Mansfield, of the Mansfield-Fuller group, a United States Post Office inspector, and against Walter R. Gall and the Cummer Sons Cypress Company, composing the Gall-Cummer group, it failed to state a cause of action. He, therefore, in the September order, filed September 8, 1953, dismissed the complaint as to them, though he denied the motions of the other defendants to dismiss the complaint for failure to state a case against them under the Sherman and Clayton Acts, and, in the same order, he sustained plaintiffs' motions to dismiss the cross-claim which the defendants, Clyde C. Pierce and Clyde C. Pierce Corporation, had filed against the plaintiffs, countercharging them with

violation of the Federal Anti-trust Statute to the damage of cross-complainants.

Thereafter, as to the plaintiffs' suit against the other defendants, the district judge took the actions, made the decisions, and entered the orders following. On October 26, 1953, of the opinion: that the Florida Three Year Statute of Limitations, F.S.A., Sec. 95.11(5)(2), covering "any action upon a liability created by a statute other than a penalty or forfeiture", was the applicable limitation statute in this case; that the Federal Suspension Statute [3] suspended the running of the statute from October 10, 1942 to June 30, 1946; and that the doctrine of fraudulent concealment applies in civil action under the Federal Anti-trust Statute; he entered an order so finding.

In the same order, he set for argument on December 1, 1953, the question whether the complaint alleged sufficient facts to require a trial of the tendered issue, whether the Florida Statute of Limitations was tolled for any cause and for any period of time beyond June 30, 1946, and the question coming on for argument and being fully argued, the district judge filed, on January 14, 1954, a thoughtful and careful opinion, note 2 *supra*, giving a negative answer to the question. In it, summing up the facts alleged in the complaint and considering and discussing the arguments addressed to them and the cases cited, he held: that they were not legally sufficient to toll the statue; and that plaintiffs' suit was barred and should be dismissed. So holding, he entered an order of dismissal which did not provide for leave to amend.

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[3] See Note to 15 U.S.C.A., Sec. 16.

On January 20, 1954, however, appellants were granted leave to amend, and, on February 15th, they filed their amended complaint, in and by which they adopted the original complaint in its entirety, and, without in any way amending or attempting to amend the allegations of Paragraph 1 of the complaint, that the jurisdiction in the case was based upon, and the action arose under, the anti-trust laws of the United States, added, just preceding the prayer for relief, several paragraphs devoted to the fraudulent concealment issue.

On March 5, 1954, upon consideration of the amended complaint, the district judge, of the opinion that the amendment had not cured the defects of the original complaint and that as amended the complaint failed to allege facts tolling the statute, filed a memorandum opinion [4]

[4] "* * * The Court has considered and studied the amended complaint and for reasons stated below finds and holds it insufficient to necessitate a trial upon the issues attempted to be raised thereby.

"The first question raised by the amended complaint is whether the Court erred in holding the statute of limitations began to run upon the expiration of the Federal Moratorium Act (15 U.S.C.A. Sec. 16 note) on June 30, 1946. Plaintiffs assert in the amended complaint, as they did in the original complaint, that the statute of limitations did not begin to run until July 19, 1948, when the so-called Pasco County suit, brought by the State Board of Administration against plaintiffs, on Jan. 17, 1944, was finally terminated. While it is true, as the complaint alleges, that the Pasco County suit was not finally terminated until July 19, 1948, the complaint alleges no conspiratorial overt acts committed by defendants or by State authorities subsequent to June 30, 1946.

"The Court, therefore, finds and holds that the failure to terminate the Pasco County suit until 1948 did not prevent the running of the statute of limitations upon the expiration of the Federal Moratorium Act.

"The remainder of the complaint sets out in more detail the alleged conspiratorial activities of the defendants in inducing State and Federal authorities to institute various proceedings against plaintiffs. There is nothing new in these allegations. They simply set out in greater detail charges made against defendants in the original

giving his reasons and entered judgment of dismissal accordingly.

Plaintiffs, appealing from the order of September 8, 1953, dismissing their action as to the defendants Cummer Sons and Gall for failure of the complaint to state a claim, and from the order of March 5, 1954, dismissing their suit against the other defendants as barred by limitation, are here insisting: as to the former, that the complaint alleged sufficient facts to connect Gall and Cummer Sons with the Ball duPont conspiracy; and, as to the latter, that it was error to dismiss their suit as barred, because: (1) the Florida general or catch all Four Year Statute of Limitations, and not the Florida Three Year Statute of Limitations, dealing with a cause of action created by statute, applies in the case; (2) the conspiracy claimed was a continuing conspiracy, con-

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complaint. The amended complaint, however, does make it even clearer that all the matters concerning which plaintiffs complain were matters instigated by State and Federal officers and employees and that public authority was the only visible instrumentality by which plaintiffs' business and property were set upon and destroyed.

"To permit this case to go to trial upon the allegations of fraudulent concealment set out in the amended complaint would necessitate impugning the honesty and sincerity of many of the State and Federal officials and employees who had any connection whatever in the many investigations that led to the numerous complaints lodged against plaintiffs by State and Federal authorities. Assuming, as I do, that the State and Federal officials were honest and sincere in the performance of their official duties, the amended complaint, instead of making out a case warranting a trial upon the issue of fraudulent concealment, makes out a better case that no fraudulent concealment existed.

"The Court finds and holds that the allegations of the amended complaint are, on the face of the complaint, insufficient to toll the statute of limitations and that this action is barred and the suit should be dismissed.

"An appropriate order will be entered herein again dismissing this cause of action on the ground that it is barred by the Florida three year statute of limitations."

stituting a single cause of action, and since the complaint alleged that the conspiracy was overtly in progress by the direct attack on plaintiffs in the Pasco County suit and damages were accruing on July 19, 1948, limitation did not commence to run in 1946, when the Federal Suspension Statute expired, but on July 19, 1948, when the Pasco suit came to an end; (3) the anti-trust action for damages, resulting from the civil prosecution of appellants in the Pasco suit, is not barred regardless of whether the action as to the other wrongful acts is; (4) at least, in the alternative, appellants were entitled to relief from damages resulting from an actionable conspiracy under Florida Common law since federal jurisdiction had already attached on the assertion of a substantial federal right and, as to that cause of action, limitation had clearly not run; and (5) that, in all events, the district judge erred in holding that the allegations of the amended complaint were not sufficient to at least take the issue to the jury on the question of fraudulent concealment.

In support of their claims that the court erred in dismissing their action, as to Gall and Cummer Sons for failure to state a cause of action, and as to the other defendants because it was barred, plaintiffs are here, with an exhaustive brief of 109 pages, advancing many theories, citing in their support many cases, and ringing the changes on the arguments pro and con, while the Ball duPont defendants, opposing to them briefs of comparable size and scope, are aided by briefs of their co-appellees which, though smaller in compass, deal competently and adequately with the substance of the questions raised.

The briefs of the cross-appellants and the reply brief of cross-appellees on the cross-appeal of Pierce and Pierce Corporation, are also voluminous and extensive,

and, all in all, if we should undertake to canvass all the arguments, discuss all the theories, and consider all, or even a few, of the cases cited, this opinion would become, in length at least, a treatise.

We shall, therefore, proceed by setting down the conclusions we have reached, supporting each with a brief and concise statement of our reasons therefor and citing such cases only as we regard as controlling.

Speaking generally, these conclusions are that, for the reasons hereafter briefly stated: (1) we find ourselves in agreement with the order of September 8, 1953, dismissing the complaint, as to Gall and Cummer Sons, and the counter-claim of defendants, Pierce and Pierce Corporation, for failure to state a claim; (2) we find ourselves in general agreement also with the pronouncements of law, the reasons given, and the authorities cited in support of them, in the January 14th opinion of the district judge, note 2 *supra;* (3) because, however, we are of the clear opinion that the amended complaint stated facts sufficient, if proven, to toll the statute of limitations, as to at least some of the wrongs claimed, we find ourselves in disagreement with the March 5th memorandum decision on the sufficiency of the amended complaint and with the March 5th order dismissing it, and that order will be reversed and the cause remanded with directions to accord plaintiff a trial on the issue of fraudulent concealment and for further and not inconsistent proceedings.

Taking up the rulings and orders complained of, we shall consider in their turn:

First: The September 8, 1953 order as it affects (a) plaintiffs' claim against Gall and Cummer Sons; and

(b) the cross-claim of Pierce and Pierce Corporation against the plaintiffs.

Second: The October 26th order and the January 14th 1954 opinion and order finding and holding: that the Act of October 10, 1942, 56 Stat. 781, as amended June 30, 1945, 59 Stat. 306, providing for the suspension of any existing statutes of limitations relating to violations of anti-trust laws, is applicable; that it suspended the running of the statute from Oct. 10, 1942 to June 30, 1946; that there being no federal statute of limitations, the Florida Three Year Statute is applicable and limitation commenced to run on June 30, 1946; and that unless the running of the statute was tolled by fraudulent concealment, the suit was barred three years thereafter.

Third: The order of March 5th, finding and holding that the amended complaint did not state facts sufficient to take to the jury the issue of fraudulent concealment and that therefore when the complaint was filed limitation has barred the action.

The Claim Against Gall & Cummer Sons Cypress Company

While Gall and Cummer are named as defendants in Par. 4 of the complaint, no further mention is made of them until Par. 40 is reached. There, after some discussion of the Pasco County, Florida Refunding Plan of 1938, instituted by R. E. Crummer & Company, the controversy with the State Board of Administration over it, and the filing of the Lathrop suit in 1942, by bondholders, Clifford and Frank

Lathrop, the complaint alleges: that the defendant, Walter P. Fuller, to further the illegal confederation, induced others to arrange, and himself arranged, to procure intervention by strong parties, and, accordingly, the defendants, Gall and Cummer Sons Cypress Company, filed petitions of intervention in said cause; and that later and prior to the year 1944, the defendants resolving that an affirmative attack on the Pasco County plan in the state court would best serve their conspiracy, a suit was instituted by the State Board of Administration of Florida with the defendant Gall a co-plaintiff in the case. Alleging that the fees and expenses incurred in connection with the suit were not paid by Gall but were secretly paid by Cummer Sons, the complaint, upon belief and as a conclusion, alleged, "The defendants purposely arranged the parties and the attorneys in the Pasco suit so as to conceal the defendants' identity and activities in connection with the case."

Further alleging that the Pasco County suit resulted, on April 1, 1948, in a final decree on the merits in favor of the plaintiffs, establishing the validity of the refunding plan and the bonds, the complaint concludes with a quotation from the findings of fact and law in the state court, that "The individual plaintiff Gall apparently has, without justification, attempted to use the court as a means of venting his spleen upon and damaging the reputation and business integrity of the defendants".

The district judge, acting upon the well recognized rule that in pleading a conspiracy in an action such as this, a general allegation of conspiracy without a statement of the facts constituting the conspiracy, its object and accomplishment, is but an allegation of a legal conclusion

which is insufficient to constitute a cause of action,[5] concluded that the facts alleged were insufficient to charge these appellees, or either of them, with violation of the anti-trust laws.

We agree that this is so. Certainly the appellees, taxpayers in Pasco County, had an absolute right to intervene in the Lathrop suit. As certainly Gall had the same right to appear as co-plaintiff in the Pasco County suit and Cummer Sons Cypress Co. had the right to arrange for, and Mr. Adams, a distinguished and highly reputable member of the Florida Bar, had the right, as Gall's attorney in that suit to accept the payment of his fees and expenses under that arrangement. If this were not so, a citizen taxpayer could be intimidated by public taxing units and their bond buying representatives by threats of suits of the kind brought here, and the vaunted claim, that a citizen is one who knows his rights and, knowing, dares maintain them in the courts against the government and all of its minions and agents, would become a mere empty boast. None of the things done by either Gall or Cummer Sons were illegal or in violation of the anti-trust laws. As taxpayers affected by the refunding bonds, both Gall and Cummer Sons had an undoubted right to join in a suit to have the plan declared illegal. Neither of the plaintiffs was a party to the Lathrop suit, and it was only after that suit had lain dormant for two years that the State Board of Administration instituted, and Gall as taxpayer joined in, the Pasco County suit, which, the appellants to the contrary notwithstanding, was not at all times and in all places

[5] Bloch & Yates v. Mahogany, 129 F. (2) 227; Nelson Radio & Supply Co. v. Motorola, 200 F. (2) 911; Kinnear-Weed Corp. v. Humble, 214 F. (2) 891; Hudson Sales Co. v. Waldrip, 211 F. (2) 268.

looked on as an outrage and an imposition. *State Board of Administration v. Pasco County*, 22 So. (2) 387.

The complaint does not charge, or even suggest that the State Board of Administration, in bringing the suit, was a party to any unlawful combination or conspiracy, and no facts are alleged which show or indicate that Gall or Cummer Sons Cypress Company were knowingly or consciously a part of a conspiracy in violation of the Federal Anti-trust laws. Charges as to such conspiracies must be based on substantial and affirmative allegations, and no mere gossamer web of conclusion or inference, as here, trifles light as air, to the suspicious strong as proofs from Holy Writ, will suffice, and we are in no doubt that the court did not err in dismissing Gall and Cummer Sons from the suit.

The Pierce & Pierce Corporation Cross-claim Against the Plaintiffs

Whether, as the cross-appellees seem to think, there is nothing more to this claim than a carrying of the war into Africa, the pot calling the kettle black, or whether, as cross-appellants vigorously argue, their cross-claim was seriously filed and is as seriously urged, we are convinced that the positions taken and the arguments put forward in the cross-appellee's brief with respect to it are correct, and that the counter-claim was properly dismissed for failure to allege a cause of action under the Federal Anti-trust Act.

This is so, first, because what the cross-complaint charged the defendants with doing in their dealings with the Florida municipalities and the holders of their bonds was not illegal or in any manner in restraint of trade or contrary or injurious to the public interest. *Nelson Radio & Supply Co. v. Motorola, supra; Shotkin v. General Electric*, 171 F. (2) 236.

It is so, second, because the counter-claim, alleging a conspiracy between R. E. Crummer & Co. and R. E. Crummer, its active head, alleges nothing more than that, in accordance with the normal business practices of a corporation, the company took the action devised and directed by its executive head, *Nelson Radio & Supply Co. v. Motorola, supra; Hudson Sales v. Waldrip, supra;* Footnote 50, *Times-Picayune v. U. S.*, 345 U.S. 594.

It is so, third, because the counter-claim fails to plead facts showing what is essential to a suit of this kind, injury or damage to cross-plaintiffs' business proximately caused by a violation of the anti-trust laws.

It is so, finally, because if by any process of reasoning it could be considered that a cause of action under the anti-trust laws was stated, it is, as is pointed out by the appellees in their brief, completely clear on the face of the pleading, that, though the suit was not dismissed on that ground, limitations have long since run upon the claim, and the remand of the cause with directions to enter judgment against cross-appellants on the ground that limitation has barred their action would be but an idle gesture.

This brings us to the main questions presented by plaintiffs' appeal, whether the court was correct in holding in its October 26, 1953 order and its January 14th and March 5th, 1954 opinions: (1) that, there being no federal statute of limitations, the Florida Three Year Statute is applicable; (2) that, though plaintiffs' cause of action had fully accrued before June 30, 1946, the Federal Suspension Act had tolled the statute of limitations from October 10, 1942, to June 30, 1946; and (3) that plaintiffs' amended complaint having failed to sufficiently allege fraudulent concealment of the claim, the statute again began to run after June 30,

1946, and on June 30, 1949, three years afterward and six months before the suit was filed, the action was completely barred.

The Applicable Statute of Limitations

This is perhaps the most vigorously contested and argued issue in the case. Both parties agree that when, as here, there is absent a limitation fixed by federal statute, state statutes of limitation control. Appellants, however, insist that, though the suit was brought and jurisdiction asserted under the Federal Anti-trust Act, the applicable statute of limitations is the Florida Four Year general, or catch-all, Statute. Their primary argument is that, though the complaint does state a claim under the Federal Anti-trust Acts, the allegations are substantially the same as those required in a common law action in Florida for fraudulent conspiracy to which the general Four Year Statute would be applicable, and that statute and not the three year statute is applicable here.

In the alternative, they argue that if they are wrong in this, and their complaint under the Federal Anti-trust Laws is barred by the Florida Three Year Statute governing actions upon a liability created by statute, they have also correctly pleaded an action under the common law of Florida of which, federal jurisdiction having already attached, the court had jurisdiction, and that to that suit, not the three, but the four year statute, would be applicable.

The appellees, with much stronger show of reason and greater support in the authorities, we think, argue that the Florida Three Year Statute applies and, applying bars the anti-trust action, and that there is no reason or basis for

plaintiffs' alternative claim that in any event it has pleaded a common law action for which the bar is four years, and the suit on this cause of action is not barred.

We agree that this is so. Read the complaint as one will, nothing can be made out of it except a suit for damages under the federal anti-trust acts and it is mere quibbling we think to claim otherwise.

We are in no doubt, therefore, that the district judge in his opinion reached the right conclusion and gave the right reason for it in holding that the Florida Three Year Statute is the applicable limitation statute. To the cases cited by him, the following may be added. *Momand v. Universal Film Exchange,* 43 F. Supp. 996; aff. 172 F. (2) 37; cert. den. 336 U.S. 966; *Dipson Theatres v. Buffalo Theatres,* 8 F.R.D. 86; *United West Coast Theatre Corp. v. South Side Theatres,* 86 F. Supp. 109; *Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* 100 F. Supp. 15; *Levy v. Paramount Pictures,* 104 F. Supp. 787; *Electric Theatre Co. v. Twentieth Century-Fox,* 113 F. Supp. 937; *Fulton v. Loew's, Inc.,* 114 F. Supp. 676.

Appellants' reliance on *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.,* 73 Fed. (2) 333 and on *Fratt v. Robinson,* 203 F. (2) 627, will not at all do. In both of those cases the decisions were compelled by and followed the construction which the Supreme Court of the State had given to the limitation statutes, between which a choice must be made. In addition, in the Kentucky case, the choice there was not, as here, between a statute fixing a specific limitation for a definitely described cause of action and a general or catch all statute applying only where no specific statute could be looked to, but between two statutes, each fixing a specific limitation.

In the former case, by the nature of the statutes, the catch-all statute is not applicable except as a last resort. In the latter case, the choice is determined by the application of the language of each statute to the particular cause of action sued on.

In *Fratt v. Robinson*, there was no statute specifically providing for limitation of an action to recover on a liability created by statute, and the Supreme Court of Washington had held that such an action was normally subject to their general or catch-all statute, and the choice made there was not, as here, between a specific period for a cause of action created by statute as against a catch-all statute but as between a statute fixing a specific period for relief upon the ground of fraud, and the catch-all statute, under which the Supreme Court of Washington had, in default of a statute precisely fixing such a limitation, placed actions of that kind.

The Accrual of the Cause of Action

A fundamental difference between the appellants on the one side and the appellees and the court on the other, with respect to this question, arises out of the fact that appellants, upon a theory not made clear to us, contend that in a suit of this kind the cause of action does not accrue and limitation does not commence to run until all the acts complained of have been done, until, in short, the wicked cease from troubling and the weary are at rest. The theory of the district court and of the appellees on the other hand is that a cause of action accrues upon, and limitation commences to run from, the doing of the first wrongful act with resulting damages. Thus, while successive claims would arise out of successive unlawful acts and consequent dam-

ages, such claims would have to do, and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby. Cf. *Northern Kentucky Telephone Co. v. Southern Telephone & Telegraph Co.*, 73 F. (2) at 333 and cases cited.

The difference between the parties on this point is not merely verbal, it is of the essence of their contentions. If appellants' theory is applied to this case, it becomes wholly immaterial what statute of limitation is applied to it, and whether there was a statutory suspension of limitation and a fraudulent concealment of the action. For they allege that the Pasco suit, one of the overt acts relied on by them, continued until 1948, and they claim that limitation did not commence to run until that time and, therefore, the suit filed in 1949 could not have been barred.

Appellees on their part insist: that limitation commenced to run in 1941, when, as appellants plead, the conspiracy and injury therefrom began, and that since, as plaintiffs allege, the injury was complete in 1944, their business by that time fully destroyed, the damage fully done, the limitation which had begun to run in 1941, but was stayed by the Suspension Act in 1942, and, but for the Suspension Act would have finished running in 1947, commenced again to run in June, 1946, when the act expired, and finished running in June, 1948, as to actions and damages occurring in 1941, and in June, 1949, some six months before the suit was brought, as to actions and damages occurring after 1942.

We find ourselves in full agreement with appellees' theory. Indeed, we know of no principle on which appellants'

theory could rest. If accepted, it would effectively destroy the statute of limitations as a statute of peace. *Northern Kentucky v. Southern, supra,* at page 335. For the reasons hereafter briefly stated, we, therefore, conclude: that limitation commenced to run in 1941, as to acts done and damages then caused; and that it was suspended from 1942 to June, 1946, when it again commenced to run until June, 1948, as to acts and injuries occurring before, and until June, 1949, as to acts and injuries occurring after, 1942.

While appellants might have asserted successive causes of action with limitations beginning to run from each act in violation of the anti-trust laws for the damages flowing therefrom, plaintiffs' case is not so alleged. On the contrary, plaintiffs allege and argue that they have but a single cause of action which did not accrue and upon which limitation did not commence to run until every wrongful act had ceased, and they do this in the face of the fact that the complaint alleges that by 1944 their business was completely destroyed and all their damages had accrued.

In these circumstances and under these allegations, unless it was prevented by fraudulent concealment from running, limitation certainly began to run effectively in 1946, when the Suspension Statute expired. If plaintiffs had desired to allege their case differently, they might well have claimed that limitation commenced to run as to each alleged claim of wrong doing and the damages caused thereby. Thus, if plaintiffs had been able to allege a new and additional cause of action and new damages growing out of the filing and maintenance of the Pasco suit, and that these acts and these damages had occurred within the limitation period after 1946, they would, as to such damage

stand quite differently. The complaint, however, shows: that quite the contrary of this is so; that, indeed, the Pasco suit was filed in 1944, and by that time the damage had substantially all been done. Read the complaint as one will, therefore, it is not possible to find either fact or law in support of plaintiffs' claim that the running of the statute did not begin until 1948. We, therefore, reject all of appellants' claims based upon the idea that the statute did not commence to run until all acts had ceased, to hold instead that, but for the Federal Suspension Act, limitations would have commenced to run under the allegations of their petition no later than 1944, and when the Suspension Act expired it commenced to run again in 1946; and, unless tolled by fraudulent concealment, continued to run so as to bar the claim before the suit was filed.

We come, then, to the final question in the case, whether the district judge erred in holding that the allegations of the amended complaint were insufficient to make an issue of fact upon whether there was fraudulent concealment tolling the statute.

The Sufficiency of the Allegations in the Amended Complaint, that the Cause of Action had been fraudulently concealed to at least make an issue for the Jury.

This brings us at last to the final point in the case, whether the district judge was right in dismissing the amended complaint for failure to sufficiently allege fraudulent concealment. Without setting out the allegations, because of their great length, we think it quite clear that plaintiffs' amended complaint does well state their claim, that by secretly moving under the guise and protection of

the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it, and that the defendants' effort to meet this pleading by invoking judicial notice of matters which they call to our attention in their briefs, will not at all do. It may well be that the facts are better pleaded than they can or will be proved. The matters to which appellees seek to call our attention may prove the Achilles heel in, and the death wound to, plaintiffs' case before the jury, but these are not matters which arose on the face of their pleadings or in any other proper way below, and we may not consider them in passing on the ruling under review. Their claim of blissful ignorance may suffer also before the jury from their admissions in their pleadings that Ball's antipathy, indeed enmity, to them, was of long standing and had been long known to them, as it may with the jury open a breach in their defense of fraudulent concealment, but these and all other such matters are and must remain for the arbitrament of the jury and may not be adjudicated by the court.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

JUDGMENT

Extract from the Minutes of May 10, 1955

(Record page 223)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same hereby is, reversed; and that this cause be, and it is hereby, remanded to said District Court for further and not inconsistent proceedings.

APPENDIX C

To portray as briefly as possible the timetable of events upon which limitation has been applied, we summarize the allegations thus:

1. May, 1941—duPont respondents joined by Leedy-Pierce respondents lodged unworthy mail fraud charges against petitioners (R. 25-26).

2. May 1941—Respondents Shafer and Clement (now deceased) caused the creation of a Florida legislative investigating committee ostensibly to investigate public financing for purposes of future legislation but secretly aiming to damage the Crummer interests.

   This group employed respondent Fuller in 1942 (R. 26-27).

3. October, 1941 — Respondents secretly caused the repudiation of a multimillion dollar Sarasota County refunding contract of petitioners amid wide publicity alleging irregularities by Crummer interests (R. 43).

4. 1942 — Respondents Fuller and Shafer established secret liaison with defendant Mansfield, a Postal Inspector handling the duPont mail fraud charges, and these agreed to find some cause for federal criminal indictments (Cf. Items 1 and 2). (R. 28-29).

5. January, February, 1943—duPont respondents, joined by Leedy-Pierce and Fuller and Clements, secretly caused denial by the Florida Securities Commission of The Crummer Company's permit to do securities business in Florida (R. 36-38).

6. December, 1943—Florida Supreme Court ordered issuance of this permit to do securities business (Item 5 above) (R. 37).

7. January, 1944—Respondents caused the Pasco suit to be filed by inducing the suit by the Florida State Board of Administration joined by certain cooperating taxpayers, whom respondents financed. The suit alleged that the Crummer interests were guilty of fraud and overreaching of the taxing units of Florida (R. 40-41).

8. August, 1944—Petitioners were criminally indicted in the U. S. District Court in Kansas by procurement of defendants including the furnishing of much false and misleading information as well as the furnishing of legal briefs to support the prosecution (Items 1, 2 and 4 above). (R. 29).

9. March, 1946—U. S. District Court in Florida awarded to petitioners breach of contract damages for the Sarasota County repudiation and thus exonerated petitioners from the 1941 charges of irregularity (Item 3 above) (R. 43).

10. June, 1946—Federal criminal indictments dismissed by Justice Department for lack of merit (Item 8 above) (R. 34-35).

11. July, 1948—Trial on merits of Pasco suit resulted in exoneration of Petitioners from charges of fraud and overreaching of Florida taxing units, together with trial court findings pronouncing the suit as maliciously brought (R. 42).

12. December, 1949—This antitrust action was filed alleging damages to petitioners caused by the cumulative effect of these attacks (R. 1).

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FILED
SEP 6 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 300

THE CRUMMER COMPANY, a corporation and R. E. CRUMMER & COMPANY, a corporation, Petitioners

VERSUS

JESSIE BALL duPONT, et al.
Respondents

BRIEF OF LEEDY, WHEELER & ALLEMAN, INCORPORATED, HOWARD S. WHEELER AND PAUL L. PIERCE IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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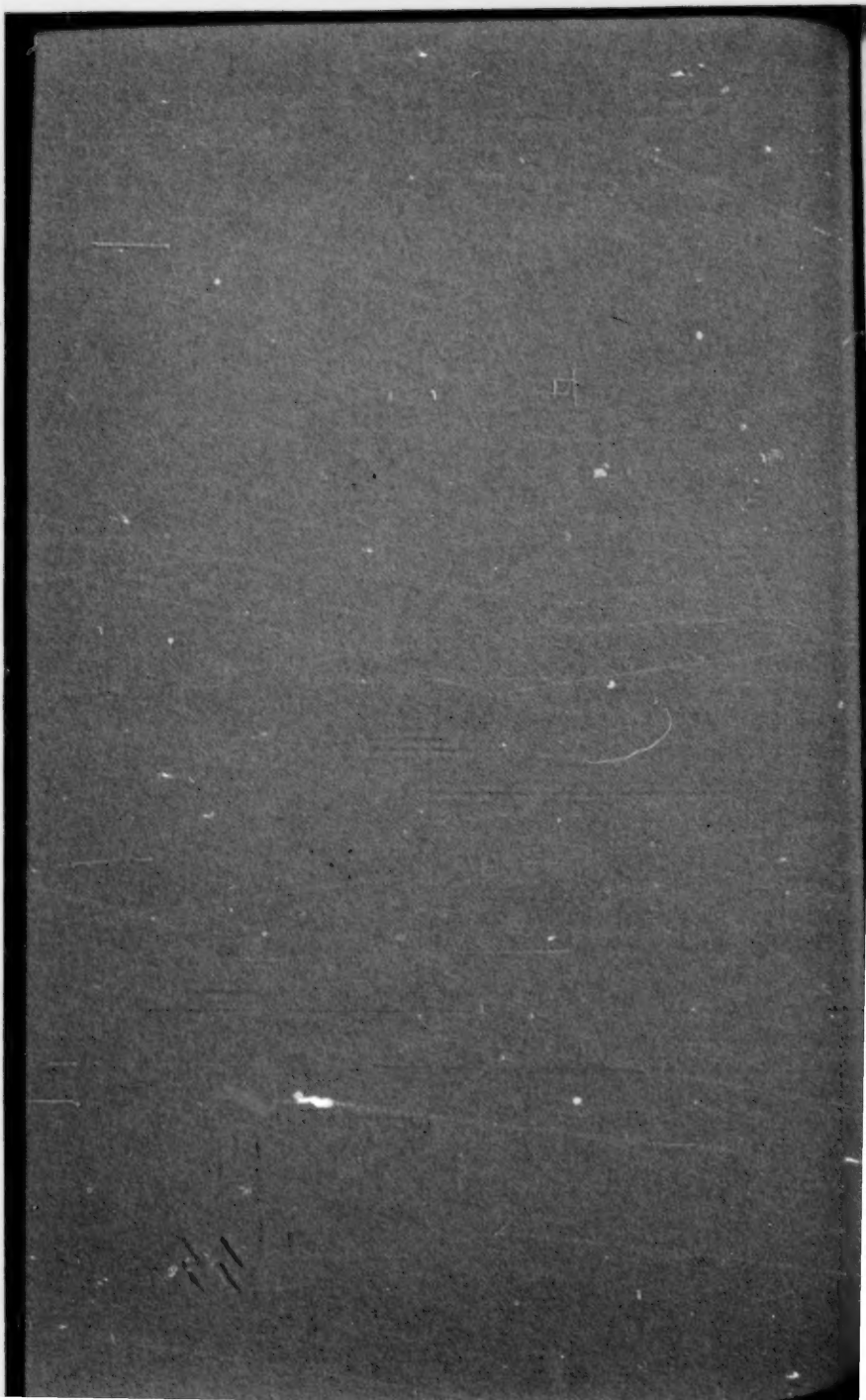

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STATEMENT

We have read with great interest the statement of the case in the petition, for we marvel at the gradual evolution of the allegations from their genesis in the complaint to and including the present petition. Petitioners started out with a long and tortured recitation of the personal and business virtues of Roy E. Crummer and the iniquities of Alfred I. duPont and Edward Ball and their dupes, the Governor and other officials and administrative boards and the Legislature

of the State of Florida, the Post Office Department and Securities and Exchange Commission of the United States, as well as some of petitioners' competitors. From these prolix immaterial averments, they proceeded to detail some seven independent overt acts by first one and another of those chosen by petitioners as "conspirators," and by the barest of conclusions, unsupported by facts or reason, attempted to harness them together to form a grand conspiracy making "predatory" and "unworthy" and "continuous" attacks upon petitioners, incidentally causing them damages in the amount of $10,000,000, by reason of which they, by invoking the Clayton and Sherman Acts, hope to reap a total windfall of $30,000,000, together with costs and attorney's fees.

The diction and rhetoric, the ultimate, rounded phrases, the argumentative recitations of conclusions rather than fact, have so improved with the nearly six years of experience in gilding the original drooping lily, have resulted in a magnificent martialing of words, but there remains the same dearth of substance and intensified vagueness, uncertainty and fictional style exemplified by the original complaint. The amendment to the complaint is illuminated by a masterful command of the English language, but few facts are alleged in such manner that the respondents and the courts will know what to expect from the evidence if the case ever goes to trial, which, however, will probably be of little interest to anyone hitherto connected with the case, if it continues its leisurely course to a verdict on the alleged merits.

The line of cleavage, as set by petitioners between them and respondents, is whether, in discussing the statute of limitations, the issue sought to be presented here, we are

dealing with a series of overt acts, all stemming from a general and comprehensive conspiracy to injure them in their property or business, or the first overt act under the conspiracy resulting in, and augmented by, continuing damages, and that the damages are the cause of action, which does not ripen or accrue so long as the conspiracy exists and the damages continue, which eventualities have not yet culminated, if we are to believe the petitioners, and draw from the allegations all possible inferences against respondents.

This being so, we think we should here enumerate the several wrongful and illegal acts which petitioners so vaguely, and sometimes evasively, allege, omitting the numerous repetition by which petitioners seek to make all sorts of people in different walks of life responsible, by the use of the words "defendants" and by constant reference to conspiracies and combinations, seer ngly under the impression that the repetitions and strong words ("predatory" is an example) somehow make the allegations more effective. We reject the so-called "timetable" (Brief of petitioners, p. 47) as a list of overt acts, enumerating 12 items, because it contains a number of instances where petitioners conceive that they were "vindicated," and some are mere incidents to the actual overt act, though some of them might be part of the conspiracy, if any. Our list, taken from the complaint, is as follows:

No.

1. May, 1941. Main and Wheeler instigated an investigation by the Post Office Department of alleged mail frauds in Lee county, Florida, alleged later to have culminated in indictments referred to in 7 below. § 38(a)-(b) of complaint, R. 25.

2. September, 1941. The Ball-duPont and Leedy-Pierce defendants induced and influenced the Florida State Board of Administration to refuse to perform its duty to carry out a contract between Sarasota county and R. E. Crummer & Co. § 41(a) of the complaint, R. 43.

3. September, 1941. Leedy-Pierce defendants induced Lee county to breach a contract held by R. E. Crummer & Co. § 41(c) of complaint, R. 44.

4. January, 1943. Edward Ball and St. Joe Paper Company made complaint against The Crummer Company to the Florida Securities Commission, which complaint opposed license for 1943, and was renewed as to issuing a license for 1944, but the Supreme Court in 1944 ordered the license to be issued. § 39 of complaint, R. 35-38.

5. April, 1943. Archie Clement, Wallace Shafer and Walter Fuller, caused and conducted an investigation of the bond refunding business, but directed the same at petitioners, alone, which culminated on the date stated in a report filed with the House of Representatives;[1] and more than 100 copies were circulated among the public. § 42 (a), (b), (c) and (e) of complaint, R. 44-46.

6. January 17, 1944. The "Pasco suit" was filed by the State Board of Administration, joined by Walter Gall and part of the expenses were paid by Cummer Sons Cypress Co. Petitioners strongly rely upon this overt act, as the suit was finally terminated in June or July, 1948. But this action was dismissed as to Gall and Cummer Sons Cypress Co., by the District Court, which dismissal was affirmed by the Court of Appeals, and no error is urged in the Petition. § 40(d)-(h) of complaint, R. 40-42, 56; Brief of petitioners, p. 36.

[1] It is alleged that the report was not filed but there is now no dispute about it, since both parties have now verified the record of the filing with the House of Representatives.

7. August 3, 1944. Mansfield and Fuller appeared before the United States Grand Jury in Kansas and presented evidence which resulted in two criminal indictments against petitioners and their officers and key employees. These indictments were dismissed June 10, 1946.

The Court has doubtless already noticed that, aside from the question of whether there is any issue important enough to take up the time of this Court, and challenge the exercise of its discretion to issue the writ, the petitioners pose the questions (1) whether the Florida three or the four year statute of limitations applies (see Petitioners' Brief, p. 21, 22); and (2) if the three year statute applies, do the allegations of the complaint show that the statute ran before the commencement of the action. The question of whether that statute is tolled by fraudulent concealment is not in issue here.

The Moratorium Act[2] suspended the running of the statute of limitations from October 10, 1942, to June 30, 1946.

The last over act pleaded was delivered on August 3, 1944, being the Kansas indictments. Also on January 17, 1944, the Pasco suit was commenced. The indictments were dismissed on June 10, 1946, while the Pasco suit was finally terminated by the dismissal of an appeal to the Supreme Court (39 So. 2d 559) and entry of a final order on the mandate by the trial court on July 19, 1948. All other overt

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[2] C. 589,56 Stat. 781, c. 213,59 Stat. 306. See note to 15 U.S.C.A. § 16 p. 524.

acts alleged began and terminated long before June 30, 1946. Thus we find that every overt act had its inception and beginning more than three years before this action was commenced, and only one, the Pasco case, was pending in some state of quiescence at the beginning of the three year period.

The petitioners here argue that the statute did not begin to run as long as they were sustaining damage, and, although it is alleged that their business was completely destroyed by, and during the pendency of, the Kansas indictments, they are still sustaining damages from all of the overt acts. We have been unable to determine at just what stage in these proceedings the petitioners conceived the unique and implausible contentions now being made, particularly *the contention that the statute of limitations is four years.*

It is clear that the contention of the respondents is (1) that the statute of limitations in Florida for this action is three years, which bars the action as to any cause of action of petitioners that accrued more than three years prior to December 19, 1949, the date on which this action was commenced, (R. 1), and (2) that the statute began to run as to each overt act when it was fully committed, and that the last overt act was mature for action by the petitioners against respondents on August 3, 1944, though the running of the statute was suspended until June 30, 1946, so that the action as to all overt acts was barred on and after June 30, 1949. The respondents consider the contention that the statute is suspended so long as they claim that damages were or are accuring is contrary to the law as it has been laid down up until the date of this brief.

ARGUMENT

I. THE PERIOD OF THE STATUTE OF LIMITATIONS

We might as well, at once, dispose of the question of the period of limitations applicable to antitrust actions. It seems agreed, or at least conceded, that the statute of limitations of Florida is applicable; but petitioners say it is four years, while the District Court and Court of Appeals agree with respondents that it is three years. We are confronted with two questions: First, Is the importance of the question such as to move this Court to review it? and second, are the decisions of the lower Courts in error?

No Question of Transcending Importance is Involved

It does not appear that the decision sought to be reviewed, on the aspect now under consideration, is in conflict with any decision of this Court, or any other Court of Appeal, because the question has never before been presented to this Court or any other Court of Appeal, so far as we know. It has arisen in one other District Court, which is in agreement with the present decision.[3]

The question can only arise in connection with an action which accrued in Florida, and begun either in one of the District Courts of this state, or some state, such as New York, which applies the limitations of the state in which the cause of action arose. This eliminates any interest

[3] *Walden v. Paramount Public Corp.*, Trade Regulation Cases 1955, paragraph 68,097.

in the decision in cases accruing in the other 47 states, and the Territories and possessions of the United States.

As noted by petitioners in their brief,[4] the question will be of no importance in cases arising after January 7, 1955, for then the Federal statute of limitations will apply.

The correctness or incorrectness of the decision will be of interest in cases where private litigants are concerned and the cause of action accrued after the expiration of the Moratorium Act on June 30, 1946, and before January 7, 1952, but then only where the space of more than three and less than four years from the accrual of the cause of action and commencement of the action appears and the question of the statute of limitations is raised. We know of only one such case which has been heretofore cited. It is very unlikely that there will be more, as Florida is not a very fruitful source of antitrust litigation.

Unless this Court should depart from its established doctrine that it is not an ordinary court of appeals under compulsion to intervene in private litigation merely because the court of appeals may have erred on some proposition of law to the disappointment of one of the parties, there is nothing to this question sufficient to challenge the jurisdiction of this Court, even though, if sitting as a court of appeals, it would have reached a contrary conclusion, and held that the four year Florida statute should apply.

The Lower Courts were Correct in Holding the Three Year Statute of Limitations is Applicable in an Antitrust Action

The question here seems so simple that it should not be

[4] Page 19.

belabored with extensive argument or fraught with any substantial doubt.

The choice is between § 95.11(4) and § 95.11(5)(a), Florida Statutes.[5] One says that an action is barred in four years, if it is not *specifically* provided for in that chapter. The other says that it is three years if it is upon an action *created by statute,* not a penalty or forfeiture. It is as simple as that.

The petitioners, in the complaint, founded the jurisdiction of the court on two statutes,[6] and throughout the petition refer to "this antitrust suit." Without the statute they could not have entered the District Court, for they did not found the jurisdiction on diversity of citizenship, and could not have done so, for they alleged one of the defendants to be a citizen of Delaware, in which state they are domiciled.[7] They could not hope to recover $20,000,000 in unearned profits in addition to the $10,000,000 which they claimed to have lost, together with attorney's fees,[8] without the statute, either in a state court or in the Federal courts.

So, it seems clear that *if* the cause of action is on a liability created by statute, as it certainly is, the three year statute as provided in § 95.11(5) (a) applies, and since the limitation is specifically provided for in the statute, § 95.11(4) has no application.

But petitioners seek to induce the Court to depart from the plainly marked path, and follow them along tortuous,

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[5] See Petition, Appendix A, p. 21
[6] Complaint I, 1, R. 3
[7] Complaint II, 2, 3, R. 3.
[8] Complaint, Prayer 2, R. 52.

unmarked trails, unlighted by either statutes or pronouncements of any court, in order to reach a result not within the contemplation of Congress or the Florida Legislature.

In their efforts to confuse the issue, petitioners have cited six Florida cases.[9] These cases have only one thing in common, that is, that in Florida an action lies based upon a conspiracy to injure a plaintiff in his person, business or property, in the same manner as the more restricted action of conspiracy at common law.[10] In *Faulk v. Allen*, 152 Fla. 413, 12 So. 2d 109 (1943) it was held that the four year statute of limitations applied to such an action. Since the liability was not created by statute, or covered by any other provision of the statute of limitations, the court could not well have applied any but the catch-all provisions, § 95.11 (4).

But in *Garsed v. Sugarman*, 99 Fla. 327, 126 So. 157 (1930) the court emphasized that the liability was not created by statute. Attention was drawn to our criminal conspiracy statute, and the court said:

> "Our statute, Section 5400, Rev. Gen. Stats. of 1920 (Section 7541, Comp. Gen. Laws of 1927)[11] defines conspiracy and materially enlarges its scope as a crime over the common law conception of the act but it does not attempt to modify or abrogate its civil aspect."

There is nothing in any of these cases that even hints that where a statute gives a special and either limited or enlarged relief to a party who might have brought an action of

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[9] Petition p. 4.
[10] III Blackstone,* 126.
[11] Florida Statutes, § 833.01.

libel, or slander, or of malicious prosecution or conspiracy at common law, is limited to two years under § 95.11(6) or extended to four years under § 95.11(4), when relying upon statutes such as the antitrust acts.

In support of the common sense construction that a statutory action is not a common law action "not specifically provided for," we notice two related cases having the same style: *La Floridienne etc. Society Anonyme v. A.C.L.R. Co.*, 63 Fla. 208, 58 So. 185 and 63 Fla. 213, 58 So. 186. In Florida a statute provided that where a railroad company collected freight charges higher than those prescribed by the Railroad Commission, the shipper could recover the overcharge, with the addition of expenses and attorney's fees occasioned thereby. In the first case cited the court held that the common law action for charges of unreasonable rates was not extinguished by the statute, though the commission rates could be accepted as proof of the unreasonableness of the rates in the trial of the case. The statute contained a limitation shorter than that for the common law action. The second cited case was brought under the statute, and when a plea was filed setting up the special statute of limitations, the plaintiff sought to amend his declaration by setting up a cause of action under the common law. In the meantime the ordinary statute of limitations had run against the common law action, unless the amendment should be held to relate back to the commencement of the action. This question in turn depended upon whether or not the amendment stated a different cause of action from the original declaration. The court said:

> "The statutory right of action allows the shipper to recover any 'over charge' for the transportation of freight paid in excess of the rates prescribed by the

railroad commissioners 'together with such additional amount as the jury may find necessary to reasonably compensate him for all expenses, including the value of his own time and services, and all reasonable costs and attorneys' fees incurred in the recovery of such damages.' * * * The common law right of action allows the recovery only of freight charges paid in excess of reasonable rates.

"The common law right of action to recover freight charges in excess of reasonable rates is wholly different from and has no necessary connection with the statutory right of action to recover freight charges in excess of the rates fixed by the commissioners, together with expenses. The demand is new and different, and the measure of recovery is different, therefore the substitution of the common law right of action for that given by the statute constitutes a departure from a right of action asserted under a statute to a right of action afforded by the common law, and should not be permitted after the common law right of action is barred by the statute of limitations."

Here the common law action of conspiracy is entirely different from the remedy given by the Antitrust Acts, which are limited to conspiracies and acts that offend against the Antitrust Acts, and result in damage to the business and property of the plaintiff. No doubt there are cases where the same evidence would sustain a recovery in either action; that was true in the foregoing cases, unless the finding of the commissioners was unreasonably high or low.

Also, in the common law action for conspiracy, no right exists for treble damages, though in some cases a jury might award punitive damages, but these must be based upon evidence not necessary in an antitrust case. No attorneys' fees are awarded in a common law action for conspiracy.

Thus every difference exists between common law conspiracy and a conspiracy actionable under the Antitrust Laws, as existed between the common law and statutory actions in the *La Floridienne case*. Likewise the same similarities existed.

An action for conspiracy lies in cases where there has been an agreement or understanding between two or more persons to do one or more unlawful acts, or a lawful act or acts in an unlawful manner, with the intent to injure another in his personal rights, liberty, business, property or reputation. It is immaterial whether the public is injured or not. A conspiracy or combination entered into merely to protect the rights or advance the business of those so engaged, and which results in injury to a third person, is not actionable, unless such injury was intended as one of the objectives of the conspiracy. A successful plaintiff may recover his actual damages, and where the acts of the defendants were wanton or malicious, he may recover punitive damages in such amount as the judge or jury, in their discretion, may award, but not attorneys' fees; and the amount in addition to the compensatory damages is not fixed by statute.

On the other hand, in an action under the Antitrust Act, 15 U.S.C. § 15, we note that the action lies only where the conspiracy and the acts under it are in violation of the Antitrust Act; no intent to injure the plaintiff is necessary, such injury resulting from the violation alone being required; injury to the public is an essential ingredient; the conspiracy must relate to, and affect interstate commerce; proof that the acts were done with an intent only to advance the business of the defendants is rarely, if ever, any defense to an anti-

trust action if the injury to the public and the plaintiff results in the manner prohibited; wantoness and malice are immaterial, as treble damages are awarded as a matter of law whether the acts were wanton and malicious or not; and the plaintiff, if he recovers, is entitled, as a matter of statutory law, to reasonable attorneys' fees.

So, the only similarity between the common law and statutory actions is that, within a narrow field, the plaintiff has the choice of suing at common law or under the Antitrust Acts, if it so happens that in a rare case the facts will support both. The statute of limitations may compel the choice.

We conclude, therefore, that an action for a conspiracy under the common law and one in violation of the Antitrust Laws, are different in substantial aspects, which have been recognized and applied by the Florida courts.

Another case pertinent here is cited below.[12]

The foregoing merely reinforces the conclusion easily drawn from the language in our statute of limitations, to the effect that this action is upon a liability created by statute, and does not fall within the scope of the catch-all section. Also, the uniform construction of similar statutes by Federal courts, is, as admitted by petitioners, exactly the same as placed by the Court of Appeals on the Florida statutes.

The only case out of which petitioners appear to derive any comfort is the *Northern Kentucky Telephone Co. v. Southern Bell Telephone Co.*, 73 F. 2d 333, cert. den. 294 U. S. 719, and this we are at a loss to understand. The Kentucky statute differs from the Florida statute in two impor-

[12] *Smith v Barnett National Bank*, 116 Fla. 454, 156 So. 478.

tant particulars. The clause relating to liability created by a statute is limited to cases in which the statute does not provide a different limitation, which had been held to mean that it did not apply when the limitation statute provided otherwise as well as to such special provision contained in the statute creating the liability. It also provided a different period for certain specified actions, including "conspiracy" We have no such provision. The case simply held that the antitrust action involved was on a "conspiracy," and, though created by statute, it came within the exception or proviso, and that the limitation applicable was that relating to conspiracy. This decision is entirely consistent with the other Federal cases, including the decision in this case.

We therefore contend that the courts below were correct in holding that the applicable limitation was three years.

II. APPLICATION OF THE STATUTE OF LIMITATIONS

Every time this case is argued in any court we are confronted not only with more polished and renovated factual situations, but entirely new theories of law, which, perhaps need no answer, but we feel constrained to point out their speciousness.

As we understand the present contentions, it is urged that, though the alleged conspiracy was carried forward by seven distinct "predatory" attacks with "conspiratorial" intent, and that the final of these blows, from which resulted sufficient damage to utterly destroy plaintiffs' business, was

[13] Complaint, § 38 (t), R. 32.

launched on August 3, 1944, the statute did not begin to run until the last peppercorn of damage was sustained, and the damage is alleged to have continued to accrue up until the bringing of the action, notwithstanding the alleged utter destruction of the plaintiffs prior to the conclusion of the criminal proceeding on June 10, 1946[13]—still more than 3 years prior to the commencement of the action.

We understand the law to be, and that it always has been, that the beginning of the running of the statute of limitations is the very first day on which the injured party may bring his action.[14] In tort cases, this is at the time the plaintiff first suffers injury from the wrongful act. The petitioners cite nine cases,[15] mostly from Courts of Appeal, in some of which this Court had an opportunity to correct errors, if any existed, and they confess that all of them decided in favor of what they call the "multiple cause of action" theory.[16] They cite only *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 100 F. Supp. 15 (D.C. N.Y. 1951) supporting their "single continuous wrong" theory.

There are only two or three sentences in that opinion that may seem to agree with petitioners' theory, but it is observed that all of the 40 or more "overt" acts were identical in nature, mere repetitions, except as to time, and, what is more important, the court held that the patent suits involved, the overt acts which had been decided in favor of the conspirators, followed a decision of the Court of Appeals of the Third Circuit, which decision was, several years later, set

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[14] *Clark v. Iowa City*, 20 Wall. 583; *Amy v. Dubuque*, 98 U. S. 470; *Moline Plow Co. v. Webb*, 141 U. S. 587; *Sohn v. Waterson*, 17 Wall, 596.

[15] Brief, p. 8, note 4.

[16] Brief, p. 10.

aside because of improper and fraudulant influence exerted against a judge of that court.[17] The victim of the conspiracy did not and could not learn of the fraud perpetrated by the defendants until shortly before bringing its action. So the real holding of the court was not that the statute began to run when the last overt act was delivered and the plaintiff ceased to suffer damage, but was that the statute began to run when the fraud was exposed, under a statute similar to our § 95. 11(5)(d). There is nothing in the *Winkler-Koch* case, or any other case that we have examined that supports the theory that where a specified number of overt acts, each different from the other in quality and in the nature and quantum of damages, covering a period of more than three years, may support a claim, as against the statute of limitations, when the last act occurred before the termination of the Moratorium Act, and suit was not brought for more than three years after such termination. Even if these were continuing torts, which they were not, because of different character, the action is barred, though it is assumed that damages continued to accrue until the bringing of the action.[18]

Since the right to bring an action and the beginning of the limitation period, by authority and reason, are coincident, then the argument of petitioners must be that where such a conspiracy exists and injury is sustained, the victim must sit by and suffer until the conspirators accomplish his com-

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[17] See *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514.

[18] *Urie v. Thompson*, 337 U. S. 163, is readily distinguishable, for we do not have here a progression of increments, not by themselves creating any recognizable cause of action, finally culminating in a cause of action for which remedy was given, at which time the statute began to run, but we have, according to petitioners' pleading, a limited number of unrelated acts, each of which, if proved, was sufficient to constitute a cause of action.

plete destruction or weary of the effort to destroy him, before he can seek the courts for a vindication of his rights and the salvage of his business. If a plaintiff does that, the only conclusion is that he prefers to rely upon his right to treble damages rather than preserve his business where he must work for his money.

> "It once was supposed that the provision for treble damages might make the antitrust laws self enforcing. The theory was that a potential wrongdoer would be deterred by the threat of a large judgment, while the lure of treble damages would furnish incentive for an aggrieved party to bring suit. Industries were thus expected to police themselves."[19]

It has been said that this section has merely created a bonanza for those who are successful in these actions, but no one can doubt that it was the purpose of Congress to provide a method whereby victims of antitrust violations could be recruited to aid the public authorities in enforcing the act, and thereby benefit those of the general public who may not be able to find such a profitable remedy for themselves.

That being true, it was certainly intended that actions should be brought as soon as humanly possible, and before the conspiracy had accomplished its full purpose, and maximum damage or injury to the public interest. However, as we read the petitioners' brief, they proceed on the theory that the courts should encourage private interests to delay

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[19] "Treble Damages and Counsel Fees" by Morris M. Doyle, Proceedings of Section on Antitrust Law, August 18-19, 1954, A.B.A., p. 142; reason recognized *Lawlor v. National Screen Service*, Supreme Court, June 6, 1955.

[20] *Christiana v. Sarasota*, 65 So. 2d 878 (Fla.); *McLaughlin v. Western Union Telegraph Co.*, 17 F. 2d 574 (C.C.A. 5).

action until they sustain a maximum damage, that may be augmented by the excess allowable under the statute.

There is no merit in the contention that the statute is tolled so long as damages are being sustained. If there has been an unlawful invasion of right, and damage has resulted, the injured party has the right to sue, and the statute is not tolled or extended, though the magnitude of the damage is not discovered until after the statute has run.[20] A plaintiff suing within the period of limitation and prevailing, would be entitled to recover for all damages that he had already sustained, together with such as might be reasonably foreseen in the future, naturally flowing from the overt acts alleged and proved. The rule for proving damages not capable of exact computation is very liberal,[21] although probably in one case it works in favor of plaintiff and in another in favor of the defendant.

We see a great deal in petitioners' brief about the Rules of Decision Act, but have been unable to see its pertinence. As the petitioners have failed to cite a single decision of the Florida court purporting to construe § 95.11 (4) and § 95.11 (5)(a) in any case remotely resembling the situation here, we do not see how the above act is involved, nor do we see just cause for criticizing the Court of Appeals for following the unanimous decisions of the several Courts of Appeals that have passed upon the questions here presented.

We note[22] that petitioners say that the decision in this case conflicts with the decisions of five Courts of Appeals because those courts felt themselves bound by decisions of the

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[21] *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359.
[22] Appellants' Brief, p.17.

State courts in antitrust cases. Without examining these cases to check appellants' interpretation of them, it is only necessary to say that if there were any decisions of the Florida courts on the questions posed by appellants, we do not doubt that the Court of Appeals of the Fifth Circuit would have followed them on any question of state law.

If the Court should follow the suggestion of the petitioners and grant certiorari for the purpose of deciding any question about the Rules of Decision Act, it could only advise the courts and litigants generally of the views of the Court on the statute, which we understand this Court will not undertake, unless something of real importance is at issue, requiring such an expression from the Court.

In concluding the argument, we have a word to say about the so-called Pasco case. This is an anomaly here, because neither of the defendants involved are in the bond business, nor shown to be in anywise interested in the destiny or ambitions of the Ball-duPont defendants, or any other defendants. The action was commenced by the State Board of Administration, and Gall, a taxpayer, intervened to protect his rights and the rights of the public, which appeared to have been jeopardized by the defendants in that case.[23] The complaint here was dismissed as to Gall and Cummer Sons Cypress Company, and this was affirmed by the Court of Appeals, and the latter court held that there was nothing to indicate that Gall, Cummer Sons or the Board of Administration were in anywise connected with any conspiracy, or wrongful act.[24] Review of this decision is not sought. It

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[23] *State Board of Administration v. Pasco County*, 22 So. 2d 387 (Fla.)

[24] Petitioners' Brief, p. 37.

therefore would seem that it is entirely immaterial when that case was commenced or concluded so far as the statute of limitations is concerned.

The petitioners, by weak conclusions, attempted to charge that the "defendants" were responsible in pursuance of the giant conspiracy, for the bringing of the Pasco suit in January, 1944. The statute of limitations has, of course, run as to that. Not a single averment is made as to any further connection by the other defendants in this case, unless we may infer that they sat by and chortled with glee at the discomfiture of petitioners in their efforts to escape from the case.

But, in any event, the statute of limitations as applicable to a conspiracy to bring an action, unlike the application to an action for malicious prosecution, begins to run from the bringing of the action, and not from its successful termination, for conspiracy lies even though the action was well founded.[25]

So, however, we view it, the fact that the Pasco case was not finally dismissed until July, 1948, can not aid the petitioners.

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[25] *Dr. P. Phillips & Sons v. Kilgore,* 152 Fla. 578, 12 So. 2d 465; 15 C.J.S. 1002. In *Harford v. Graves,* 136 So. 620 (Fla.) the Supreme Court of Florida upheld the declaration alleging a conspiracy, though it appears from a copy of the declaration appearing in Carson's Common Law Pleading (Rev. Ed.) 400, that there was no allegation that either proceeding had terminated, or that the plaintiff had prevailed in them.

CONCLUSION

Without further comments, we urge upon the Court that this case was properly decided (except that we doubt the correctness of the decision as to fraudulent concealment, which is not in issue here), and that there is no question of sufficient importance, or within the reasons which this Court has, from time to time, expressed, that ought to persuade this Court to grant the writ.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 300.

THE CRUMMER COMPANY, a corporation, and R. E. CRUMMER & COMPANY, a corporation,
Petitioners,

vs.

JESSIE BALL DUPONT, *et al.*,
Respondents.

MEMORANDUM ON BEHALF OF WALTER R. GALL AND CUMMER SONS CYPRESS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The joinder of the respondents, Walter R. Gall and Cummer Sons Cypress Company, as defendants, to the petitioners' $30,000,000.00 anti-trust suit, was based solely upon allegations of these respondents' participation in litigation as taxpayers of Pasco County (R. 39 *et seq.*).

The District Judge found that the complaint failed to state a claim against respondents, Walter R. Gall and Cummer Sons Cypress Company, and granted their respective motions to dismiss on that ground (R. 56, 58, 104, 105). This was before the District Judge ruled that the action was barred by the statute of limitations upon which

ground he dismissed the action as to the principal defendants (R. 73).

The Circuit Court of Appeals ruled that the District Court was correct in dismissing the complaint as to these respondents for the reasons specifically set forth in its opinion (see pages 34-37 of the Petition for Certiorari). These reasons did not include the statute of limitations.

The petition for certiorari does not attack the decision of the Court of Appeals sustaining the granting of these respondents' motions to dismiss. The reasons relied on for granting the petition for certiorari are limited to rulings with respect to the statute of limitations and do not affect the granting of the respondents' motions to dismiss.

Petitioners having failed to set forth any reason or ground for granting certiorari to review the decision of the Circuit Court of Appeals sustaining the District Court's Order dismissing Walter R. Gall and Cummer Sons Cypress Company from this action, the petition for certiorari should be denied as to that portion of the decision of the Court of Appeals.

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Supreme Court of the United States

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At the outset before proceeding to our argument some comment is required concerning the grounds on which the jurisdiction of this Court is invoked. It is also necessary to correct inaccuracies in the questions Presented and the Statement of the case as set forth in the Petition for Writ of Certiorari.

JURISDICTION

Petitioners invoke jurisdiction under 28 U.S.C. Section 1254 (1). They recognize that they are attempting to bring before this Court for review only an interlocutory judgment

—and actually an interlocutory judgment in their favor. The District Court had dismissed the complaint of the petitioners as plaintiffs in that Court, whereupon the Court of Appeals, in and by its judgment here sought to be reviewed, reversed and remanded "for further and not inconsistent proceedings" (Petition, p. 45-46).

Petitioners seek to avoid the well-established rule that this Court will not ordinarily review interlocutory orders or judgments.[1] The only reason given is petitioners' reference to "the awful prospect of the expensive litigation" which lies before them before they can return (if at all) "armed with a final judgement" (Petition, p. 15).

We further point out that petitioners make no allegation that the decision here is in conflict with the decision of any other Court of Appeals. Nor can that Court be said to have decided an important question of federal law which has not been, but should be, settled by this Court. For however important the applicable statute of limitations may be to the parties here in this particular case, the matter was recently set at rest by Congress in its enactment of Public Law 137, 84th Cong. Ch. 283, H.R. 4954, establishing a uniform federal statute of limitations for all future antitrust actions.

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[1]In *American Construction Co. v. Jacksonville, T. & K. W. Ry Co.*, 148 U.S. 372, 383-384, 37 L.Ed. 486, the Court pointed out that the writ was not issued to review an interlocutory degree of the Court of Appeals "unless it is necessary to prevent extraordinary inconveniences and embarrassment in the conduct of the cause," and in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 60 L.Ed. 629, the Court said: "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision" (Citing numerous cases).

QUESTIONS PRESENTED

Petitioners allege two questions to be presented. First, they pose the question whether in selecting the appropriate state statute of limitations to apply to an antitrust action the federal court may disregard state decisions in favor of following federal decisions applying the limitation statutes of other states. Such a question answers itself. In truth, the federal court disregarded no Florida state decisions but acted in consonance with state decisions, and the decision of the federal court draws strength from and is confirmed by those state decisions, as we shall hereinafter demonstrate.

Second, petitioners inquire whether the statute of limitations may be applied as a bar where the attack by the defendants on the business of the plaintiff "was overtly in progress and causing substantial damage to plaintiff, and against which plaintiff was defending, within the limitation period" (Petition, p. 2). This is contrary to the facts alleged by petitioners in their own complaint, as we shall hereinafter demonstrate. The Court of Appeals pointed out in its opinion that petitioners themselves alleged that by June 10, 1946, their business was "paralyzed" and "destroyed" and that they were "effectively eliminated and suppressed as competitors in the municipal investment field in the United States" (Petition, p. 277, and in the Complaint, R.32). That was the alleged object of the purported conspiracy among the defendants (R.24).

Yet in order to bring themselves within the statute of limitations, the petitioners come here asserting that until July, 1948, the alleged attack of defendants was "causing substantial damage to plaintiff". Neither a man nor a business can be killed but once. And the petitioners, having set

the date of death, without controversy or qualification, cannot change that date in this Court.

STATEMENT OF FACTS

Petitioners' Statement of the case reiterates the inaccuracies above mentioned. Petitioners says (Petition, p. 3-4): "This attack which caused damage to plaintiffs' business * * *, was overtly in progress against plaintiffs until July, 1948 * * *". Complaining here of the Court of Appeal's action, petitioners say (Petition, p. 6-7):

> "The court emphasized several times that under its interpretation of the pleadings that by 1944 'the damage had substantially all been done,' an interpretation to which the court adhered even in the face of petitioners' prayer for injunction against these violations so they could continue their business and their further allegations that the Pasco suit was coordinated with the balance of the attack, * * *"

The so-called Pasco suit was brought against petitioners by the State Board of Administration (a board consisting of the then Governor, the State Comptroller and State Treasurer) and the respondent Walter R. Gall, and entitled *Spessard L. Holland, et al. v. Pasco County, et al.* (R. 40-41). It was brought in January, 1944, some months before the petitioners were criminally indicted (as appears from Appendix C of the Petition, p. 47-48). The members of the State Board of Administration are not sued here. Respondents Walter R. Gall and Cummer Sons Cypress Company (which company allegedly paid the fees of Gall's attorney in the suit) were dismissed as defendants here by the District Court. This action was sustained by the Court of Appeals, that Court saying among other things (Petition, p. 36):

"None of the things done by either Gall or Crummer Sons were illegal or in violation of the antitrust laws."

Petitioners say "* * * plaintiffs in that case knew or should have known that the charges of fraud, misrepresentation, and overreaching could not be sustained" in that suit(Petition, p. 6).

Gall having been dismissed, none of the respondents here were parties to that suit. Assuming, as the complaint alleges, that these respondents induced the bringing of the suit, it cannot be assumed that they had any control over the conduct or dismissal of the suit. If that suit were permitted to drag on for fifteen years instead of the four and a half years it was pending, the petitioners could claim with equal validity that the statute of limitations did not run until 1962.

Likewise, in footnote 2 on page 4 of the Petition, Petitioners would infer that the action for conspiracy is unique in Florida and has no parallel elsewhere, instead of being, as it is, common to many jurisdictions. See 11 *Am. Jur.* 577-578. Florida has not set itself apart from other states which recognize the common law action for conspiracy. In the Florida cases cited in the footnote we do not find any language in the opinions that Florida has consciously disregarded the law of any other jurisdictions where the action for conspiracy is recognized as available. Nor do we find in the case of *Faulk v. Allen,* 152 Fla. 413, 12 So. 2d 109, there cited, any reference (a) concerning the component torts comprised in the action for conspiracy, or (b) the petitioners' quoted language that its component torts may be "specifically provided for," elsewhere in the limitation statute (Petition, p. 4, footnote 2).

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Cause of Action Accrued When the Damage was Done.

The petitioners do not really assert that there is any true conflict of precedent in the Courts of Appeal. On the contrary, it seems to be the burden of their argument that the lower Courts have for decades and in repeated cases been voicing and applying a rule which this Court should now belatedly overturn. This, again, presents a somewhat unique ground for the issuance of a writ of certiorari.

It is the theory of the petitioners, as stated in their Petition in this Court, that, in a civil suit under the anti-trust laws for conspiracy to monopolize or restrain interstate commerce, the statute of limitations does not begin to run so long as there is such conspiracy and that the principle, so often echoed in federal decisions, that such statutes of limitations begin to run when "the plaintiff's interest is invaded by an act of the defendants" must be overturned.

It may be observed paranthetically that this argument does not square with the theory upon which petitioners prepared their complaint. Without question, the original and amended bills of complaint both proceeded upon the notion that the statute of limitations began to run with the commission by defendants of overt acts occasioning damage to the plaintiffs. Otherwise, there would have been no point in alleging so elaborately their charges of fraudulent concealment of the cause of action against the defendants as matter for avoiding the bar of the statute of limitations. As drafted, the several complaints met the issue of the statute of limitations by the plea of fraudulent concealment. And it is of interest that the decision of the Court of Appeals has given

them a trial upon this issue. The very relief the petitioners sought originally in their complaint they have thus secured by the decision of the Court of Appeals. It would seem fair to assume that further inquiring by the petitioners into the facts has disclosed the weakness of their plea of fraudulent concealment and has induced them to seek to reverse the unbroken line of federal decisions by their instant application to this Court.

Leaving to the side the fact that, as we have seen, the Court of Appeals has given the petitioners what a fair reading of their complaint apparently sought, it is respectfully submitted that the position taken by the petitioners is untenable and does not take into account the nature of a private suit under the antitrust laws.

The gist of the action under the antitrust statutes is the *injury or damage* inflicted on the property or business of a person pursuant to the unlawful conspiracy in violation of the antitrust laws.

> *Foster & Kleiser Co. v. Special Site Sign Co.* (CAA 9, 1936), 85 F. 2d 742.
>
> *Morris & Co. v. Nat'l. Ass'n. of Stationers* (CCA 7, 1930), 40 F. 2d 620.

One of the early cases which considered this question of when the cause of action accrues is *Bluefields S.S. Co. v. United Fruit Co.*, (CCA 3, 1917), 243 Fed. 1. This was an action for treble damages under the antitrust laws. In discussing the question of when the status of limitations begins to run, the Court said:

> "The statute began to run when the cause of action arose, and the cause of action arose when the damage

occurred. Then action might have been brought. * * *" (Emphasis supplied)

In the case of *Burnham Chemical Co. v. Borax Consolidated,* (CA 9, 1948), 170 F. 2d 569, cert. den. 337 U.S. 961, the plaintiff alleged that it was in the business of producing borax, that the defendants conspired to destroy its activities, and that as a result of the actions taken pursuant to that conspiracy the plaintiff's plant and business were shut down and closed in January, 1929. The suit was brought in July, 1945, under the antitrust statutes. The complaint alleged a continuing conspiracy and that long after 1929 the plaintiff was prevented from getting a government lease by action of the defendants pursuant to the conspiracy. The Court said (p. 576-577).

> "* * * a cause of action for damages for violation of the antitrust laws accrues when the damage is sustained and the statute of limitations begins to run at that time: * * *"

Further in considering the subsequent incident relating to the proposed government lease, the Court said (p. 577):

> "* * * appellant frankly conceded at the trial that while 'making an issue' of the incident as an 'overt act,' it could not prove any damages from it."

Obviously there could be no further damage after the plant and business were shut down and closed in 1929.

To the same effect see *Suckow Borax Mines Consol. v. Borax Consolidated,* (CA 9, 1950) 185 F. 2d 196, cert. den. 340 U.S. 943.

Petitioners attempt to distinguish the above two cases by saying (Petition, p. 8): "* * * these conspiracies and all

their overt acts occurred (and did their total damage) well outside the limitation period." Again they would have the Court believe that damage was done to them — substantial damage — after their business was destroyed.

Petitioners conceded that a multitude of decisions (set forth in the footnotes on pages 8 and 9 of the Petition) would appear to be against them. But they say (Petition, p. 10):

> "However, upon very close scrutiny of the facts, it appears that this is the first actual holding which completely bars a plaintiff in the face of attack, defense, and *damage* all concurring *within the limitation period.*" (Emphasis supplied)

They would differentiate this case by claiming, in the teeth of the allegations of their complaint, that damages were occurring within the limitation period.

The fallacy in the petitioners' argument is well illustrated in the case of *Park-In Theatres v. Paramount-Richards Theatres,* (D.C. Del. 1950) 90 F. Supp. 727, where the Court said:

> "If the Statute of Limitations had no precise date, as the happening of the overt act, from which it could be computed, then there could be no limitation of actions at all applicable where the conspiracy continued. *Of even greater importance is the fact that the injured party would seem to have no right of action so long as the conspirators chose to keep the conspiracy in a continuing state.* The Statute of Limitations must run from the commission of the several overt acts complained of." (Emphasis supplied)

To the same effect is the case of *Momand v. Universal Film*

Exchange (CA 1, 1948) 172 Fed. 2d 37, at page 49, the Court said:

> "The plaintiff's second objection as to when the statute of limitations begins to run in a conspiracy case is based on a misreading of criminal cases in which it was said that the continuance of a conspiracy depended upon the commission of overt acts, and that the statute of limitations did not begin to run against a criminal prosecution until the last overt act performed in compliance with the original agreement had been accomplished. It is another and greatly different thing to say, as the plaintiff impliedly does, that a private right of action for damages arising out of a conspiracy does not accrue until the conspiracy is ended, irrespective of the time when the injury is inflicted. *On this theory a single act of damage in an antitrust case would be subject to no period of limitation so long as the conspiracy continued, although no further injury was done to the plaintiff. Nor could the plaintiff, on this reasoning, sue in the meantime. All the conspirators would need to do to escape suit is to keep the conspiracy in operation. We have found no authority to support this view.* We think the trial court properly ruled that a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion and that the applicable statute of limitation ran from that time." (Emphasis supplied)

It has been often held that a conspiracy in violation of the anti-trust laws confers no private right of action. Such private action arises only when an overt act has been committed pursuant to the conspiracy, occasioning injury to the plaintiff. And when such injury is sustained, an action accrues and the statute of limitation begins to run. The most instructive case on this point is the opinion of Judge Wyzanski in *Momand v. Universal Film Exchange et al.*, 43 F. Supp. 996, aff. 172 F. 2d 37, *certiorari* denied 336 U.S. 966, 93 L.Ed. 1118. There, the plaintiff charged a general con-

spiracy to violate the anti-trust laws, from which injury to him resulted. He referred to a nation-wide conspiracy of the very broadest import. It had as a subsidiary motive the destruction of plaintiff's business. It referred to several overt acts of injury. Judge Wyzanski said:

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. . . . When those new invasions occur, new causes of action will accrue and a new period of limitations applicable to the damage from those invasions will begin."

And further the Court there pointed out (at p. 1006) that the plaintiff can recover for all present and future damages caused by such invasion. The Court there states:

> "For that particular invasion, he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial."

As opposed to the many decisions against them on this point, petitioners point out and rely upon "only one dissenting, or perhaps distinguishing, voice" (Petition, p. 9), the case of *Winkler-Koch Engineering Co. v. Universal Oil Products Co.* (D.C. N.Y. 1951) 100 F. Supp. 15. The peculiar facts of that case distinguishes it. There, plaintiffs charged the defendants with a conspiracy to monopolize through primarily claims of patent rights, resting upon a favorable patent infringement judgment obtained through fraud. Of course, until the fraud became known, thus undermining the judgment upon which the patent infringement suits rested, the cause of action did not accrue. But that is something quite different from this case.

Petitioners also rely upon *Urie v. Thompson,* 337 U.S. 163 (1949) to the effect that in a personal injury case, where the plaintiff contracted silicosis, "limitation does not run from day to day, but only when the accumulated effects manifest themselves by way of an active disease." The business of petitioners was not only diseased — it was dead — by 1946 and well over three years before this suit was started. In this case, unlike in the Urie case, the plaintiffs know they were being damaged from the overt acts.

The Court of Appeals properly gauged the situation saying (Petition, p. 43-44):

> "Thus, if plaintiffs had been able to allege a new and additional cause of action and new damages growing out of the filing and maintenance of the Pasco suit, and that these acts and these damages had occurred within the limitation period after 1946, they would, as to such damage stand quite differently. The complaint, however, shows: that quite the contrary of this is so; that, indeed, *the Pasco suit was filed in 1944, and by that time the damage had substantially all been done.* Read the complaint as one will, therefore, it is not possible to find either fact or law in support of plaintiffs' claim that the running of the statute did not begin until 1948." (Emphasis supplied)

Undoubtedly it was because of this that the petitioners set up in their complaint their plea of fraudulent concealment by way of bar to the application of the statute of limitations. And, in the light of such positive allegations of petitioners' own complaint, how can it be argued that any alleged conspiracy of the defendants "was overtly in progress and causing substantial damage to plaintiff, and against which plaintiff was defending, within the limitation period"?

This point, so disingenuously pressed by the petitioners,

is without merit, involves no conflict in the decisions, and presents no warrant for the issuance of a writ of certiorari.

B. As both the District Court and the Court of Appeals Correctly Found, the Three-Year Florida Statute of Limitations Applied to this Action.

Petitioners assert that "* * * Florida, unlike other jurisdictions, recognizes conspiracy as an independent civil action." As is pointed out in *11 Am. Jur. 577:*

> "The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof — of damage — not the conspiracy or the combination.

That authority cites in support of the above statement decisions from some eighteen different states. It will not do to attempt to differentiate Florida from all other jurisdictions in this regard. But even if it were different from all other jurisdictions and were the only state in which the civil action for conspiracy were recognized, that could have no effect here.

As the Court of Appeals points out, in the absence of a limitation fixed by federal statute, the state statutes of limitation control (Petition, p. 39). Since Florida has no statute of limitations expressly applicable to antitrust actions, the choice to be made is between the three-year statute applicable to "an action upon a liability created by statute other than a penalty or forfeiture," and the four-year statute (the catchall provision) applicable to "any action for relief not specifically provided for in this chapter."

Nor is the *Northern Kentucky Case*[2] *in point*. There, the

[2]Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co. (1934) 73 F. 2d 333.

Kentucky statute of limitations included two specific provisions, both of which were express. One covered a cause of action for conspiracy. It included all conspiracies (which the Court construed to include a statutory action for conspiracy). The other statute dealt with a liability created by statute. Under that peculiar situation, with two express provisions, the Court adopted the express conspiracy provision. But Florida has no specific provision in its statute covering by name "conspiracy." It has only two possible relevant provisions. One is the section dealing with a liability "created by statute;" the other is the "catchall" section. The catchall is inapplicable because the section dealing with a liability created by statute covers precisely this case. And that is just what every other court has held, courts dealing with what is in effect the precise statute of limitation we have in Florida.

Since the time of the decision of the *Northern Kentucky Case* in 1934, the federal courts have uniformly held that a treble damage suit under the antitrust laws is an action upon "a liability created by statute other than a penalty or forfeiture," where, as in Florida, such a provision is found in the state statute of limitations.[3] And we may remark that

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[3]*State of Oklahoma v. American Book Co.*, (CCA 10, 1944), 144 F. 2d 585; *Foster & Kleiser Co. v. Special Site Sign Co.*, (CCA 9, 1936), 85 F. 2d 742; cert den. 299 U.S. 613, 81 L.Ed. 452; *Burnham Chemical Co. v. Borax Consolidated*, (CA 9, 1948), 170 F. 2d 569; cert. den. 337 U.S. 961, 69 S. Ct. 1529; *McClellan, et al. v. Montana-Dakota Utilities Co.*, (CA 8, 1953), 204 F. 2d 166; cert. den. 346 U.S. 825, 98 L.Ed. 43; *Momand v. Universal Film Exchange*, (D.C. Mass., 1942), 43 F. Supp. 996; aff. 172 F. 2d 37; cert. den. 336 U.S. 966, 93 L.Ed. 1118; *Hansen Packing Co. v. Swift & Co.*, (D.C. N.Y. 1939), 27 F. Supp. 634; *Dipson Theatres v. Buffalo Theatres*, (D.C. N.Y. 1948), 8 F.R.D. 86; *United West Coast Theatre Corp. v. South Side Theatres*, (D.C. Cal. 1949), 86 F. Supp. 109; *Winkler- Koch Engineering Co. v. Universal Oil Products Co.* (D.C. N.Y., 1951), 100 F. Supp. 15; *Levy v. Paramount Pictures*, (D.C. Cal. 1952), 104 F. Supp. 787; *Reid v.*

(footnote continued p. 15)

eight of these cases involved charges of conspiracy and three were from jurisdiction with statutes of limitations identical with that of Florida.

To this unanimous list of decisions can be added the very recent case of *Walder v. Paramount Public Corp.* (D.C. N.Y., decided June 27, 1955) — F. Supp. — in which it was held that the Florida three-year statute of limitations was applicable. There, although the applicable limitation period was said to be ordinarily the law of the forum, New York borrowed and applied the limitation period of the state where the cause of action arose, which, in that case, was Florida. While this case merely confirms the unanimous list of decisions above mentioned, it is interesting to note that the identical question was decided in the same way with respect to the particular state (Florida) statutes here involved.

Contrary to petitioners' assertions, there is no real or substantial analogy between a common law action for conspiracy to injure business and property and an action under the Federal Antitrust Laws for injury occasioned by the monopolization and restraint of interstate commerce. The principal characteristics which distinguish one action from the other are as follows:

As to origin: The common law action for conspiracy has its original and present existence solely in the common law. The antitrust action has its original and its present existence solely in the acts of Congress.

As to purpose: The purpose of the common law con-

(footnote 3 continued)
Doubleday & Co. (D.C. Ohio 1952), 109 F. Supp. 354; *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.*, (D.C. Mo. 1953), 113 F. Supp. 937; *Fulton v. Loew's Inc.*, (D.C. Kans. 1953), 114 F. Supp.676.

spiracy action is to redress the private party for the wrong suffered by him. The purpose of the antitrust action is to protect the public, the private rights and remedies being merely incidental and subordinate.

As to attorney's fees: The common law conspiracy action carries with it no right to recover attorney's fees. The antitrust action provides for the recovery of attorney's fees.

As to monopoly, restraint of trade, suppression of competion, and the like: In a common law conspiracy action the element of monopoly, restraint of trade, suppression of competition, and the like are not material to or within the scope of the action. In the antitrust action monopoly, restraint of trade, suppression of competition, and the like are indispensible elements.

As to injunctive relief: The common law conspiracy action is an action at law and consequently injunctive relief is not available. The antitrust action has by some courts been called "sui generis," and the statute creating the right of action expressly provides for injunctive relief.

As to intention: In the common law action the element of willful intent to do harm is indispensable. In the antitrust action the element of intent to injure is not necessary.

As to the application of the Federal Moratorium Act: In a common law conspiracy action the Moratorium Act clearly does not apply.

The relief granted in the antitrust action is sui generis, and the statutory remedy is exclusive.

Gedes v. Anaconda, 254 U.S. 590, 593, 65 L. Ed. 425, 429;
Decorative Stone Co. v. Building Trades Council (CCA 2, 1928) 23 F. 2d 426, 428.

The Court of Appeals well recognized that the petitioners had only an action for damages under the antitrust laws and not an action for conspiracy by saying (Petition, p. 40):

> "Read the complaint as one will, nothing can be made out of it except a suit for damages under the federal antitrust act and it is mere quibbling we think to claim otherwise.
>
> "We are in no doubt, therefore, that the district judge in his opinion reached the right conclusion and gave the right reason for it in holding that the Florida three-year statute is the applicable limitation statute."

The petitioners urge that the District and Court of Appeals, in determining the governing statute of limitation in this action, "failed to read with meticulous care the special pronouncements of Florida law" and erred because "they referred to federal decisional law pertaining to the statutes (of limitation) of other states" (Petition p. 15). It may well be doubted that these grounds, stated in such obscure and tortuous terms, could support the granting of a writ of ceriorari. Without regard to this, however, a review of the record in the District and Circuit Courts demonstrates irrefutably that the point made by the petitioners is wholly without merit.

Both lower Courts recognized, as this Court has consistently held in repeated cases, that a private right of action under the antitrust laws, whether for restraint, monopolization or conspiracy to restrain or monopolize, is "an action upon a liability created by statute, other than a penalty or

forfeiture." The right of action thus created by statute, it has been established, did not exist at common law and is not a codification of common law.[4] It is a statutory right of action, with an exclusive statutory remedy. And it is this "action upon a liability created by statute, other than a penalty or forfeiture" which the Petitioners have invoked.

Both lower Courts, also, assumed without dissent that, since the antitrust laws, at the time of the institution of this action, included no statute of limitations of its own, this suit would be controlled by the applicable statute of limitations of the State of Florida (i.e., the state of the forum). Neither Court sought to "stray from" the Florida statutes or to adopt a so-called "federal approach." Both Courts accepted without question that the issue was one of local law and sought to follow the language of the Florida statute, as it had been authoritatively established in the Florida decisions themselves.

Subdivision 5(a) of Section 95.11 of the Florida statute of limitations provides a three-year limitation for "an action upon a liability created by statute, other than a penalty or forfeiture." Following two clear-cut decisions, one dealing with a suit to recover statutory freight refunds[5] and the other to recover a statutory bank stock liability,[6] and thir-

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[4]*Standard Oil Co. v. United States,* 221 U.S. 1, 55 L.Ed. 619, 641; *Kinnear-Weed Corp. v. Humble Cil & Refining Co.* (CCA 5) 214 F. 2d 891; *United States v. Addyston Pipe & Steel Co.* (CCA 6) 85 F. 271, aff. 175 U.S. 211, 44 L. Ed. 136; *Shotkin v. General Electric Co.* (CCA 10), 171 F. 2d 236.

[5]*La Floridienne et al. v. A.C.L. R.R. Co.,* 63 Fla. 208, 58 So. 185; 63 Fla. 213, 58 So. 186.

[6]*Smith v. Barnett National Bank of Jacksonville* (1934), 116 Fla. 454, 156 So. 478.

teen federal decisions[7] arising in antitrust suits involving identical provisions in other state statutes of limitation, both the District Court and the Court of Appeals held that such three-year statute, embracing specifically "an action upon a liability created by statute," controlled in this case. The correctness of such conclusion, it would appear, is indisputable.

Three federal courts (the District Court, the Court of Appeals and also the New York District Court in the case of *Walder v. Paramount Public Corp.*, supra), seeking to ascertain the Florida limitations applicable to cases of this character are unanimous and without dissent that such actions fall within the three-year provision of the Florida statute. These are the only courts which have examined the specific question.

The petitioners sought to escape from both the logic of, as well as the controlling precedents in support of, the conclusions reached by the lower Courts in this question by a

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[7] *State of Oklahoma v. American Book Co.*, (CAA 10, 1944), 144 F. 2d 585; *Foster & Kleiser Co. v. Special Site Sign Co.*, (CCA 9, 1936), 85 F. 2d 742; cert den. 299 U.S. 613, 81 L. Ed. 452; *Burnham Chemical Co. v. Borax Consolidated* (CA 9, 1948), 170 F. 2d 569; cert. den. 337 U.S. 961, 69 S. Ct. 1529; *McClellan et al. v. Montana-Dakota Utilities Co.*, (CA 8, 1953), 204 F. 2d 166; cert. den. 346 U.S. 825, 98 L. Ed. 43; *Momand v. Universal Film Exchange*, (D.C. Mass., 1942), 43 F. Supp. 996; aff. 172 F. 2d 37; cert. den. 336 U.S. 966, 93 L. Ed. 1118; *Hansen Packing Co. v. Swift & Co.*, (D.C. N.Y. 1939), 27 F. Supp. 364; *Dipson Theatres v. Buffalo Theatres*, (D.C. N.Y. 1948), 8 F.R.D. 86; *United West Coast Theatre Corp. v. South Side Theatres*, (D.C. Cal. 1949), 86 F. Supp. 109; *Winkler-Koch Engineering Co. v. Universal Oil Products Co.* (D.C. N.Y. 1951), 100 F. Supp. 15; *Levy v. Paramount* Pictures (D.C. Cal. 1952), 104 F. Supp. 787; *Reid v. Doubleday & Co.* (D.C. Ohio 1952), 109 F. Supp. 354; *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.* (D.C. Mo. 1953), 113 F. Supp. 937; *Fulton v. Loew's Inc.* (D.C. Kans. 1953), 114 F. Supp. 676.

disingenuous but palpably untenable suggestion. It is the contention of the petitioners that this action is not controlled by that section of the Florida statue which expressly deals with an "action upon a liability created by statute" but, on the contrary, is covered by that provision of the Florida statute of limitations which embraces "any action for relief not specifically provided for in this chapter," i.e., the catch-all provision. The difficulty with this contention is that this present action under the antitrust laws is "an action upon a liability created by statute" and as such is "specifically provided for" under subdivision (5) of the Florida statute of limitations. It accordingly cannot fall within the catchall provision, covering only unspecified and unenumerated actions.

To bolster their argument, though, petitioners assert that an action for common-low conspiracy is recognized in Florida and that such action was held to be within the "catch-all" provision of the statute of limitations. This decision was obviously correct but is wholly without application here. This is not an action for a common-law conspiracy; it is "an action upon a liability created by statute." Moreover, there is no specific provision of the Florida statutes providing for an action upon a common-law liability for conspiracy. Unquestionably, it would not fit the defiinition of "an action upon a liability created by statute." The suit for common-law conspiracy had to fall, therefore, within the catch-all provision. This is quite different from this action upon a statutory right of action redressable only under the statute, a type of action which is expressly covered by a specific provision.

There is thus no merit in this position so strenuously urged by the petitioners. Petitioners, recognizing the weakness of this argument in the Court of Appeals, urged that

their suit should be sustained as an action for common-law conspiracy and not one under the anti-trust laws and thus controlled by the "catch-all" provision of the Florida statute of limitations. Such argument flatly contradicted the unequivocal assertion of petitioners' complaint and the asserted basis of federal jurisdiction. It is to be noted that the petitioners have abandoned their argument that their suit may be held one for common-law conspiracy and have denominated in their Petition before this Court their suit as an action under the anti-trust laws (Petition, p. 3). By their own admission, the action asserted by the petitioners is one "upon a liability created by Statute." As such, the applicable Florida statute of limitations is three years. Had the lower Courts held otherwise, they would have made a mockery of language too plain for serious argument.

Petitioners recognized when they brought this suit that the three-year statute of limitations was applicable. They attempted to avoid the bar of the statute by pleading fraudulen concealment. If the four-year catchall statute were applicable, there would be no occasion for the elaborate allegations of fraudulent concealment. Now that they realize the difficulty of proof of the fraudulent concealment, they (a) deny that the three-year statute is applicable, and (b) glibly refer to unspecified damages within the three-year period, notwithstanding the contrary and undisputed allegations of their own complaint.

CONCLUSION

For the foregoing reasons it is respectfully submitted

that this petition for a writ of certiorari should be denied.

September 3, 1955.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing brief was served upon counsel for petitioners by mail the ____ day of September 1955.

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